

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF PENNSYLVANIA

3 UNITED STATES OF AMERICA, :Criminal Action No.:  
4 Plaintiff, :2:19-cr-00717-GAM-1  
5 v :  
6 WILLIAM A. MERLINO :  
7 Defendants. :Philadelphia, Pennsylvania  
8 :August 5, 2022 at 9:15 a.m.  
9 :  
10 . . . . .

11 TRANSCRIPT OF CRIMINAL JURY TRIAL DAY THREE  
12 BEFORE THE HONORABLE GERALD A. MCHUGH  
13 UNITED STATES DISTRICT COURT JUDGE

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1 (The trial commenced at 09:13 a.m.)

2 THE COURT: Good morning, Counsel.

3 MS. BURNES: Good morning, Your Honor.

4 MR. GAMBURG: Good morning, Your Honor.

5 THE COURT: Just came in, I understand that  
6 counsels have had the opportunity to look at the revised  
7 points for charge overnight. And that Mr. Henry says he  
8 doesn't think there's any issues, but if so, let me know.

9 MR. GAMBURG: No issues on behalf of the  
10 Defense.

11 MS. BURNES: And no issues on behalf of the  
12 Government. Specifically, Your Honor, I think you invited  
13 Government review of the -- of the venue provision and  
14 I've no objection to the proposed defense one.

15 THE COURT: All right.

16 MS. BURNES: Which is the one you listed  
17 first.

18 THE COURT: We'll use the defense -- the  
19 defense version, and -- and I did make some revisions in  
20 the language of your points, Ms. Burnes.

21 MS. BURNES: Uh-huh. I saw that, Your  
22 Honor.

23 THE COURT: Okay. So yeah, more by way of  
24 clarity and just because it's going to be confusing. And  
25 so I just wanted to make sure you looked at those as well.

1 And if so --.

2 MS. BURNES: Yes, Your Honor. I've -- I  
3 reviewed everything.

4 THE COURT: Good. Excellent. Okay. Good.

5 MS. BURNES: And -- and -- and -- and  
6 clarity is welcome, and I have no objection.

7 THE COURT: All right. Then I'll -- I'll  
8 go back in and keep working on some other cases until we  
9 have the Jury.

10 MS. BURNES: Yes, Your Honor.

11 MR. GAMBURG: Judge, just for the Court's  
12 edification. For Mr. Borden, I do have a few exhibits,  
13 but it's really just continuous motion that was filed July  
14 26th. The Government's response, which I don't intend on  
15 getting into the body of it, and the Court's order denied.

16 THE COURT: Sure.

17 MR. GAMBURG: I told Ms. Burnes, maybe that  
18 -- that -- that level of specificity, but that's it.

19 THE COURT: Understood.

20 MR. GAMBURG: That's why.

21 THE COURT: All right. Good.

22 MS. BURNES: Thank you.

23 THE COURT: Let's go off the record.

24 (Off the record; 09:14:45 to 09:36:36)

25 THE COURT: District of Pennsylvania is now

1 in session. The Honorable Gerald McHugh presiding.

2 THE COURT: All right. Counsel, I  
3 understand the Jury's here. So we'll get underway.

4 MR. GAMBURG: Your Honor, with the Court's  
5 permission, I'd like to introduce you (unintelligible)

6 MR. (not provided): Good morning, Your  
7 Honor.

8 MR. GAMBURG: He's an associate.

9 THE COURT: Welcome, Mr. (unintelligible).  
10 (Jury enters)

11 THE MONITOR: All rise.

12 THE COURT: Ladies and gentlemen, welcome  
13 back. Thank you for your prompt attendance and we will  
14 get underway with the Government's next witness.

15 Ms. Burnes.

16 MS. BURNES: Your Honor, the Government  
17 calls Mr. Edward Borden.

18 THE MONITOR: Please raise your right hand?  
19 Do you swear or affirm that the testimony you shall give  
20 to this court shall be the truth, the whole truth and  
21 nothing but the truth, so help you God or you do so  
22 affirm?

23 MR. BORDEN: I do.

24 WITNESS; EDWARD BORDEN; Sworn

25 THE MONITOR: Thank you. Please be seated.

1 Please state your name and spell it for the record?

2 THE WITNESS: Certainly. Excuse me.

3 Edward Borden, B as in boy, O-R-D-E-N.

4 DIRECT EXAMINATION BY MS. BURNES:

5 Q. Good morning, Mr. Borden.

6 A. Good morning.

7 Q. Can you tell the Jury what you do for  
8 a living, please?

9 A. Certainly. I'm a -- I'm a lawyer,  
10 been a lawyer for forty-five years. My -- what I do most  
11 is federal criminal defense work.

12 Q. And how long have you been doing  
13 federal criminal defense work?

14 A. Off and on for that entire time.

15 Q. Are you appearing here today in  
16 response to a trial subpoena, sir?

17 A. I am.

18 Q. And during the course of the  
19 Government's investigation, did you produce documents to  
20 the Government pursuant to a grand-jury subpoena?

21 A. I did.

22 Q. And in addition to those two  
23 subpoenas, did the -- did the government seek a court  
24 order from a different district court judge ordering you  
25 to testify and produce those documents pursuant --?

1 A. That's -- that's correct.

2 Q. Is it -- I want to direct your  
3 attention to the man sitting at the defense table. Do you  
4 recognize William Merlino?

5 A. I do.

6 Q. And is he a former client of yours?

7 A. Yes, I have represented Bill for some  
8 time.

9 Q. Is it common for you to testify about  
10 communications between yourself and a former client?

11 A. First time in forty-five years.

12 Q. I want to direct your attention to  
13 case number nineteen dash seven one seven here in the  
14 Eastern District of Pennsylvania.

15 In December of 2019, after Defendant  
16 Merlino was indicted by the grand jury, did you enter an  
17 appearance in the criminal matter?

18 A. I did. (Coughs) Excuse me.

19 Q. And after -- after the defendant's  
20 arraignment in the criminal matter, was the -- a -- a  
21 trial date set shortly after the indictment?

22 A. There were a number of -- multiple  
23 trial dates set. I don't -- I don't recall how many, but  
24 I'm -- I'm sure there was one set soon after the  
25 indictment was returned.

1 Q. Okay. And direct your attention to  
2 March of 2020.

3 A. Okay.

4 Q. What happened with respect to trials  
5 in the Eastern District of Pennsylvania and ultimately  
6 your practice?

7 A. Sure. They're -- really all in-person  
8 court proceedings were put on hold and remained on hold  
9 for many months. And there were general orders entered,  
10 postponing all trials, including criminal trials, for  
11 extended periods of time.

12 Q. And why was that?

13 A. Because of the COVID pandemic.

14 Q. And so I want to direct your attention  
15 to the summer of 2021. By that time had criminal trials,  
16 including Defendant Merlino, were they resuming in this  
17 district?

18 A. Yes.

19 Q. And in the summer of 2021, was this  
20 case listed for trial?

21 A. It was.

22 Q. Was that a trial date in October of  
23 2021?

24 A. It was a trial date in late October of  
25 2021.



1 Q. And with respect to a trial date, were  
2 there various other dates in -- in the scheduling order of  
3 a trial and advance of trial?

4 A. Yes, the judge will normally set a  
5 date when -- what are called pre-trial motions must be  
6 filed, a date when each side must supply certain  
7 information to the other side. There are a number of,  
8 sort of intervening deadlines that are normally set by the  
9 trial judge.

10 Q. And in the -- in July, in the summer  
11 of 2021. In July, did you file a motion with respect to  
12 the trial schedule in October?

13 A. I did. I filed a motion to postpone  
14 the trial based principally on some other trials I had or  
15 one trial in particular that I had in New Jersey, that I  
16 thought might conflict.

17 Q. And did the Court grant your motion to  
18 postpone the trial?

19 A. The -- the judge did not. He listened  
20 to what we had to say, listened to what I had to say about  
21 the scheduling issues and -- and determined that it was  
22 unlikely to conflict. In the end, he was absolutely  
23 correct. It did not or it would not have, let's put it  
24 that way.

25 And so he denied the motion to postpone the

1           October trial of Dr. Merlino.

2                       Q.    So by the end of July, or by early  
3           August, you scheduled for trial representing Defendant  
4           Merlino in the indictment charging him with introduction  
5           of misbranded drugs into interstate commerce?

6                       A.    Yes.

7                       Q.    And what, if any, steps did you take  
8           that first week of August 2021 to communicate with your  
9           client in advance of trial?

10                      A.    Well, the -- I don't -- I don't  
11           remember the exact timing of the motion to -- to postpone  
12           the trial, but Bill and I had obviously discussed that  
13           ahead of time. I told him I was going to make that  
14           request to the Court. And I filed the motion.

15                      The judge denied the -- the request. And I  
16           forwarded that order of the Court to Bill by email. And I  
17           should -- and I would just like to note here to be clear  
18           that I -- that I understand that the order that required  
19           me to testify in the grand jury also applies here, and  
20           requires that I give testimony that I would not otherwise  
21           give.

22                      Q.    Okay. Sir, so moving forward to  
23           approximately August 6th of 2021. What, if any, trial  
24           scheduling dates are significant about August 6th of 2021?

25                      A.    Well, the -- as I recall, there was a

1 deadline to file pre-trial motions that I think was August  
2 6th.

3 Thereafter, as I say, there would have been  
4 some other motions about or other deadlines about  
5 submitting proposed jury instructions and questions to be  
6 asked during voir dire, those sorts of things.

7 And then finally, there was a firm trial  
8 date in -- in late October.

9 Q. Okay. So after the denial of your  
10 motion to postpone the trial, did you speak with Merlino  
11 prior to this pre-trial motions deadline on Friday,  
12 October 6th -- Friday, August 6th?

13 A. I think the only -- I -- I tried to  
14 reach him. I -- I, as I said, I emailed him. The judge's  
15 order denying a request to postpone early in August. And  
16 then I attempted to reach him by telephone several times  
17 in the next few days to, you know, talk about a variety of  
18 things.

19 Filing motions which honest -- honestly, I  
20 had made a determination not to file. I didn't think  
21 there was anything to file. But to discuss that further,  
22 just to discuss pre-trial preparations, to discuss fee  
23 issues, number of things that we needed to discuss, and I  
24 tried to do that over several days and was initially  
25 unable to reach him.

1 Q. Okay. So let's move forward to when  
2 you were able to reach Defendant Merlino.

3 A. Okay.

4 Q. Did you have a conversation with him  
5 in -- on late Thursday afternoon or early Friday of August  
6 6th?

7 A. Yeah, it was -- I -- I think it's by  
8 coincidence, exactly one year ago today was either the 5th  
9 or the 6th. The -- the 5th of August, I think, it was  
10 Thursday afternoon. 6th was Friday. And I finally did  
11 reach him by telephone. I think it was probably Friday  
12 morning, just looking back at some things.

13 But I did reach him. I started to talk  
14 about the matters I just mentioned. And he interrupted me  
15 and said, well, I -- I have some bad news. I have been in  
16 the hospital for the last few days. And just -- was just  
17 released yesterday.

18 And I've been diagnosed with pancreatic  
19 cancer that has -- they believe has metastasized to my  
20 liver. And I obviously expressed my -- my concern for  
21 Bill, known Bill at that point for probably fifteen years.

22 And I was, you know, expressed my concern  
23 for him and said that -- that I felt in light of that --  
24 that -- that the judge would quite likely postpone the  
25 trial, so that his health condition could be addressed or

1 in any event that the judge would quite likely postpone  
2 the trial. And --.

3 Q. When --

4 A. Okay.

5 Q. -- when Merlino told you that he'd  
6 been diagnosed with cancer, with pancreatic cancer --

7 A. Yes.

8 Q. -- that had metastasized to his liver.  
9 What did you understand that to mean?

10 A. Well -- well, you know, just sort of  
11 from general knowledge, I knew that pancreatic cancer was  
12 a very very serious diagnosis, a very grave diagnosis that  
13 -- as I said, just from general knowledge at that point I  
14 believe to be one that did not have a -- well, that --  
15 that resulted in -- in death, and most cases relatively  
16 quickly if it had metastasized which is what he told me.

17 Q. And with that in mind, was it your  
18 intent to seek a postponement of the October trial date  
19 based on the information that Defendant Merlino gave you?

20 A. It was. I mean, I -- my first thought  
21 was that he would probably be in some pretty rigorous  
22 treatment at that point. And I, we did discuss treatment  
23 in the call. But I said, you know, I'm sure at that  
24 point, you're -- you're not going to be feeling very well  
25 because of whatever treatment you're having. So I think

1 it's likely that the judge would postpone the trial.

2 And he said that he had not made a decision  
3 or that -- that he and his doctor had not reached a  
4 conclusion about what his treatment would be or whether he  
5 would have any.

6 Q. And what was your understanding about  
7 a decision, about whether or not he would have treatment?

8 A. Again, just sort of general knowledge.  
9 But my general knowledge was that -- that sometimes people  
10 with that diagnosis choose not to have treatment because  
11 it's, I think it can be very invasive, and very often not  
12 successful.

13 Q. What, if anything, did you ask  
14 Defendant Merlino so that you could ask the Court for a  
15 postponement of the October trial?

16 A. I told him that in my experience  
17 dealing with medi -- medical issues and in court in the  
18 past that -- that a judge would normally, if -- if I were  
19 to bring something like that up to the Court, the judge  
20 would most likely say, well, I'm sure you're being honest  
21 with me, Mr. Borden, but I'd like to have something direct  
22 from a professional who's involved.

23 And so I told Bill that I thought we -- I  
24 thought he should call his oncologist and -- and get some  
25 sort of report, didn't have to be long. And number two, I

1       said that in my experience, very often, what's called a --  
2       discharge summary at a hospital, from a hospital would  
3       have a summary of diagnostic tests and that sort of thing.

4               And -- and probably a diagnosis on the  
5       discharge summary and that -- that should be pretty easy  
6       for him to get and that would be helpful as well.

7               Q.    Because he told you that he had just  
8       been discharged from the hospital that --?

9               A.    That's correct.

10              Q.    And did you receive that information  
11       from Defendant Merlino a letter and a discharge summary?

12              A.    I did. Within, I guess a day. I  
13       don't remember exactly. But within -- within about a day.  
14       I got a letter from a Dr. Goldberg whose letterhead showed  
15       him to be an oncologist down in the Somers Point area near  
16       where Bill lived.

17              And also, a discharge summary from, as I  
18       recall, it was Shore Memorial Hospital. I don't remember  
19       that for sure, but it was from --

20              Q.    And how did you receive this?

21              A.    -- a hospital.

22              Q.    I'm sorry, I interrupted you. How did  
23       you receive this information from the Defendant?

24              A.    By -- by email from Bill.

25              Q.    Let's take a look at Government's

1 Exhibit One seventy-one for the parties only. I approach  
2 Mr. Borden. You can look on your screen, you can also  
3 look in the binder.

4 A. Got you. This looks like a disaster,  
5 but -- yeah. Thank you.

6 Q. And can you tell the Court what's  
7 depicted at the top of One seventy -- what -- what's  
8 depicted at Government's One seventy-one?

9 A. Sure. Well, first page is a -- an  
10 email of, I guess, you'd call it cover sheet, show --  
11 showing that it was an email from William Merlino to me.  
12 The subject was letter and discharge summary. And it was  
13 sent to me on Friday, August 6th, 2021 at two fourteen in  
14 the afternoon.

15 And there -- there was an attachment, which  
16 is a -- well, it's - it's title is 2021 dot o eight dot o  
17 six Goldberg dot P.D.F.

18 Q. And is this the email and the  
19 documents you just testified about receiving from  
20 Defendant Merlino?

21 A. It is. The -- the first page and the  
22 ensuing pages are what I received.

23 MS. BURNES: The Government moves admission  
24 of Government's One seventy-one.

25 MR. GAMBURG: No objection at this time.



1 THE COURT: Admitted.

2 MS. BURNES: If we can publish that to the  
3 Jury.

4 BY MS. BURNES: (Cont'g.)

5 Q. So Mr. Borden, if you can explain the  
6 header of -- of the first page of Government's Exhibit One  
7 seventy-one. Is -- this is an email from William Merlino  
8 to you?

9 A. Yeah. And then if you look at the  
10 bottom of the page, I don't know that I can show that. It  
11 shows E.B. zero fifty-two at the bottom of page. That's -  
12 - those are Bates numbers that my office put on these  
13 documents when we produced them to the Government. So  
14 this is a copy of a printout from our email system.

15 And at the top, what it shows, apparently,  
16 when the system prints out an unknown name, unknown email  
17 sender, it just inserts the name of the person rather than  
18 the email address. So that's what -- that's how our email  
19 system printed this out.

20 Q. Okay. And if -- if I'm understanding  
21 you. When it says from W. M. Merlino, there -- there's no  
22 @gmail.com, for example, because this is an email that is  
23 known to your law offices email system.

24 A. Correct.

25 Q. Did you communicate with Defendant

1 Merlino by email during the course of your representation?

2 A. Very -- very much. That was --

3 Q. And likewise --.

4 A. -- probably ninety percent of our  
5 communication was by email.

6 Q. And likewise, the -- the to line  
7 @Borden. That's you?

8 A. It is.

9 Q. What's the subject of this email?

10 A. Letter and discharge summary.

11 Q. And the date of the email?

12 A. Friday, August 6th, 2021 at two  
13 fourteen in the afternoon.

14 Q. And the attachment to the email?

15 A. Attachment was 2021 o eight o six  
16 Goldberg dot P.D.F.

17 Q. Okay. So if we just pull-out again to  
18 the first page. There's -- there's no content in the body  
19 of the email. Is that right?

20 A. That's right. Yes.

21 Q. This is a document you were expecting  
22 from the Defendant based on the conversations you'd had  
23 with him?

24 A. It is.

25 Q. Let's take a look at the second page

1 of Government's One seventy-one.

2 A. Okay.

3 Q. Can you tell -- and -- and likewise,  
4 all of the pages of Government's One seventy-one contain  
5 that E.B. prefix. Is that right?

6 A. They do, yes.

7 Q. Okay. So if -- if we take a look at --  
8 -- at the second page of One seventy-one. What is depicted  
9 here?

10 A. This is a letter that was attached to  
11 the preceding page and came to me as part of the package,  
12 if you will.

13 Q. Let's take a look at the letterhead on  
14 this letter. Whose letterhead does this purport to be?

15 A. It says, it's Robert M. Goldberg who's  
16 an -- an oncologist and hematologist in Somers Point.

17 Q. And you -- you testified that Som --  
18 you knew Somers Point to be near where the Defendant  
19 lived?

20 A. Correct.

21 Q. Let's take a look at the -- the date  
22 of the letter and who it's addressed to.

23 A. Okay. That's -- the date's August  
24 6th, 21 -- 2021. And it's addressed to William A.  
25 Merlino, M.D.

1 Q. And what's the re of the letter  
2 regarding?

3 A. Well, it says, William A. Merlino,  
4 date of birth, that's blacked out. D.X. which, I believe  
5 to be diagnosis, abbreviation for diagnosis, carcinoma of  
6 pancreas and then a number which I don't recognize, but I  
7 assume it's some kind of medical billing code.

8 Q. Okay. So let's take a look at the  
9 body of the -- well, let's take a look at the bottom of  
10 the letter.

11 A. Okay.

12 Q. Does the letter have a -- have a  
13 signature?

14 A. Yup. The signature, as I read it, is  
15 Bob Goldberg above is Robert M. Goldberg, M.D.

16 Q. Okay. And let's take a look at the --  
17 at the body of the letter. Can you -- who's -- who's the  
18 letter addressed to?

19 A. It says it's -- in -- as you can see  
20 in type, it's addressed to Dear Dr. Merlino, and the --  
21 it's purported as if the author has crossed that out and  
22 written in Bill.

23 Q. Okay. And what does the author of  
24 this letter write in the body of the letter?

25 A. You want me just read it?

1 Q. Yes.

2 A. Okay. All right. This is to confirm  
3 our conversation regarding your diagnosis of metastatic  
4 carcinoma of the pancreas. We are presently awaiting the  
5 genetic analysis of the tumor sample, and we'll meet to  
6 develop a treatment plan. Please contact me directly on  
7 my cell phone with the following phone number if you  
8 require additional information.

9 Q. And this is a letter that you were  
10 expecting to receive from the Defendant based on your  
11 private conversations. Is that right?

12 A. It is.

13 Q. Let's take a look at the next page of  
14 Government's One seventy-one and pages three, four, five  
15 and six. One -- one document. What's -- what's depicted  
16 here.

17 A. This is what I would call or what I  
18 understand to be called a discharge summary which  
19 summarizes date of admission, date of discharge, what  
20 treatment was received during the period of a person's  
21 hospital admission, what diagnosis there would be, what  
22 physicians treated the -- the patient, some summary of  
23 important lab results.

24 Q. And this is information that you  
25 expected --

1 A. It is.

2 Q. -- to receive from the Defendant?

3 A. It is.

4 Q. Let's take a look at the -- at the top  
5 portion of this record. From the -- from the heading  
6 through the admission date and time.

7 Directing your attention to the top of the  
8 page, who's the patient on this record?

9 A. Well, Merlino being his last name,  
10 followed by William.

11 Q. Is the lettering in -- in that  
12 description, is that a uniform font?

13 A. It doesn't seem to me to be.

14 Q. Is it something you recognized at the  
15 time?

16 A. I didn't notice that at the time, no.

17 Q. Okay. And likewise, does this contain  
18 a D.O.B. that's redacted, but it does reflect an age. Is  
19 that right?

20 A. Correct. Eighty-four years.

21 Q. Okay. And to your left, this -- this,  
22 you -- you see that it's the -- the Shore Medical Center  
23 which was a hospital known to you?

24 A. Yes.

25 Q. Okay. Let's -- let's take a look.

1           What is the -- the date listed in this heading?

2                   A.    It's August 5th of 2021 at  
3           approximately six p.m.

4                   Q.    Okay. That's the -- that's the  
5           discharge date on the bottom left?

6                   A.    Yes, yes, I'm sorry.

7                   Q.    Okay.

8                   A.    Is there another date?

9                   Q.    And -- and at the top of the page, is  
10          there a date of August 1st?

11                  A.    Yes, it -- it -- what it reads is  
12          08/01/2021 attending.

13                  Q.    Let's -- let's take a look at the  
14          discharge diagnosis. And taking a look at the first line,  
15          what's -- what's the discharge diagnosis?

16                  A.    It says pancreatic mass, highly  
17          suspicious for malignancy.

18                  Q.    Okay. There's a -- there's a  
19          strikethrough on that first line. Did that appear in the  
20          original document that -- that you received from the  
21          Defendant?

22                  A.    I -- I don't remember seeing that, but  
23          I don't -- we certainly didn't -- we certainly didn't do  
24          anything to the documents. So it must have been there.

25                  Q.    Okay. These are the documents that

1           you produced --

2                           A.    Yes.

3                           Q.    -- off of your computer?

4                           A.    Yes.

5                           Q.    Okay.  And let's -- let's take --  
6           let's take a look at the H.P.I. in hospital course.  Can  
7           you read to the Jury the -- the first sentence depicted in  
8           that?

9                           A.    Sure.  It says, he -- he is a very  
10          pleasant fifty-six-year old Caucasian male with a  
11          significant past medical history of basal cell carcinoma  
12          and depression, who was admitted to Shore Medical Center  
13          for -- for pancreatic mass.

14                          Q.    And can you also take -- read the  
15          second sentence?

16                          A.    Sentence?

17                          Q.    Yeah, continue.

18                          A.    Sure.  He was in, I guess, it's his  
19          usual state of health until approximately three weeks ago  
20          when she, it says, developed upper abdominal pain which  
21          had persisted.

22                          Q.    Okay.  I'm going to stop you right  
23          there.  So the -- the pronouns in the -- in the sentence,  
24          the two sentences you just read.  Is -- is -- is there  
25          anything about the font that stands out to you today?



1           A.    Yeah, I mean, looking at it today, I  
2           note that he seems to be of a -- well, at least larger  
3           type than the rest. Male seems to be consistent with the  
4           -- with the other -- the other type. He, beginning the  
5           second sentence looks to me consistent with the -- the  
6           font. And then was in her hurt -- hurst -- well, I can't  
7           tell exactly what that word is. Almost seems to be H-I-E-  
8           R.

9           Q.    Okay.

10          A.    But whatever it is, that font looks  
11          disturbed in some way. Let's put it that way.

12          Q.    And directing your attention to the  
13          first sentence. There is a description of the age of the  
14          patient.

15          A.    Right.

16          Q.    What's -- what's the age of the  
17          patient in this record?

18          A.    It says that the patient is -- is  
19          fifty-six-years old.

20          Q.    Now, the time you received this  
21          record, did you notice that?

22          A.    I did.

23          Q.    And what did you do about it?

24          A.    I mentioned that in a phone call with  
25          Bill and said that might -- might be good to check on

1           this. I mean, I was aware that sometimes hospitals get  
2           things like gender and age and things like that which  
3           seems to be pretty straightforward to get it wrong. So I,  
4           you know, asked him to get -- get somebody in the hospital  
5           to correct that. And he said he would?

6                       Q.    Okay. Directing your -- and -- and  
7           did he?

8                       A.    He did. He -- either in an email or  
9           in our phone call, he said he would speak to the  
10          hospitalist at the hospital which is an attending  
11          physician in -- in the hospital.

12                      Q.    Directing your attention to  
13          Government's Exhibit One seventy-two for the -- for  
14          identification only.

15                      A.    Okay.

16                      Q.    Mr. Borden, is this the email you --  
17          you just described?

18                      A.    It is.

19                      Q.    Okay. And what's the date of the  
20          email?

21                      A.    Monday, August 9th, 2021 at eleven  
22          forty-five a.m.

23                      Q.    Who is it from?

24                      A.    It's from William Merlino to me.

25                      Q.    And what's the subject?

1 A. Medical records.

2 MS. BURNES: The Government moves to admit  
3 Government's Exhibit One seventy-two and publish to the  
4 Jury.

5 MR. GAMBURG: No objection in light of  
6 future witnesses, Your Honor.

7 THE COURT: Admitted.

8 BY MS. BURNES: (Cont'g.)

9 Q. Okay. Mr. Borden, if -- if you can  
10 describe to the Jury what's depicted on -- on Government's  
11 One seventy-two.

12 A. Sure. As I said, this is the --  
13 excuse me. This is the email that I received -- or this  
14 is an email that I received Monday after that conversation  
15 with Bill about the age discrepancy. And so I got this  
16 email Monday morning with -- well, he -- at least here,  
17 there's nothing attached.

18 But I -- I recall that there were -- that  
19 there was an attachment which was medical records, or  
20 which was another printout of the discharge summary.

21 Q. Okay. Directing your attention to  
22 Government's One seventy-three.

23 A. Okay. All right.

24 Q. After you got an email from Defendant  
25 Merlino saying that he spoke with the hospitalist.

1                   A.    Oh, all right. All right. I -- I  
2                   misunderstood. Okay. I -- I thought the document's text,  
3                   but -- okay. I see. Yes.

4                   Q.    Did you -- that afternoon, Monday  
5                   afternoon. Did you get another email from Defendant  
6                   Merlino?

7                   A.    I did.

8                   Q.    Did it contain a corrected discharge  
9                   summary?

10                  A.    It did. And another copy of the  
11                  letter from Dr. Goldberg.

12                  Q.    And is -- is that what's depicted at  
13                  Government's Exhibit One seventy-three?

14                  A.    It is.

15                  MS. BURNES: The Government moves admission  
16                  of Government's One seventy-three.

17                  THE COURT: Mr. Gamburg, any objection to  
18                  One seventy-three which is the corrected discharge  
19                  summary?

20                  MR. GAMBURG: No, Your Honor.

21                  THE COURT: Admitted.

22                  BY MS. BURNES: (Cont'g.)

23                  Q.    Mr. Borden, similar to Government's  
24                  One seventy-one, can you just explain to the Jury what's  
25                  depicted in the -- in the header here?

1           A.    Sure.  Again, it's a -- says that it's  
2           from William Merlino to me.  Again, this is the - how our  
3           office email system printed it out.  It says that the  
4           subject is the corrected discharge summary, gives the date  
5           of August 9th, 2021 and time of one twelve p.m.  And it  
6           says that the attachment is 2021/08/06 Goldberg P.D.F.

7           Q.    And looking below that, is there any  
8           text in the body of the email?

9           A.    There is not -- no, there is not.

10          Q.    Okay.  And were you expecting this --  
11          these follow-up records from --

12          A.    I was.

13          Q.    -- Defendant Merlino?

14          A.    I was.

15          Q.    Okay.  So let's take a look at the  
16          second page of Government's One seventy-three.  It says  
17          the same copy of the August 6th, 2021 Goldberg letter that  
18          you just testified about?

19          A.    It is.

20          Q.    And moving on to the third page of  
21          Government's Exhibit One seventy-three.  Does this  
22          discharge summary still contain a strikethrough in line  
23          one of the discharge diagnosis?

24          A.    It does.

25          Q.    Does it still contain -- and then with

1       respect to the next section, the H.P.I. and hospital  
2       course?

3                   A.    Yes.

4                   Q.    What does the discharge documentation  
5       now read?

6                   A.    He -- he is a very pleasant eighty-  
7       four-year-old Caucasian male with a significant past  
8       medical history of basal cell carcinoma and depression,  
9       who was admitted to Shore Medical Center for a pancreatic  
10      mass.

11                  Q.    Okay. And upon receipt of these  
12      records from Defendant Merlino, what did you do with them?

13                  A.    Well, I did -- did a couple of things.  
14      I think the first thing I did was to call the office of  
15      Ms. Burnes, who was the prosecutor on the case and leave  
16      her a phone message, brief phone message saying -- I -- I  
17      don't recall exactly what I said, but it was essentially  
18      that my client had a very serious medical condition. I  
19      may have said what it was.

20                  And that I would be contacting the Court or  
21      I would like to contact the Court with her to address this  
22      matter. I then wrote --.

23                  Q.    And Mr. Borden, was that back on  
24      Friday when you first --

25                  A.    Yes.

1 Q. -- received the information?

2 A. Yes, it was on -- on Friday, the 6th.

3 Q. Okay. And after contacting the  
4 prosecutor's office in the matter, what, if any, other  
5 contacts did you make on Friday when you would -- learned  
6 this information?

7 A. Sure. Then I dictated a letter to  
8 Judge McHugh. I -- that, as I recall, forwarded one of  
9 these two documents to the Court and requested a  
10 conference with -- with the Court and the Government to  
11 discuss it.

12 Q. And upon -- on Monday, upon receipt of  
13 the corrected discharge document, did you forward that to  
14 the prosecutor's office?

15 A. I did. I did.

16 Q. And where -- were there discussions  
17 among the parties in -- in the matter with respect to  
18 scheduling?

19 A. Well, yes, I -- I was able to reach  
20 Ms. Burnes on Monday by telephone. I, you know, talk a  
21 little bit more about what I learned. I remark -- I  
22 remarked that there was a discrepancy in the age, I think  
23 on the discharge summary.

24 And I said we had a corrected one and I  
25 sent both Dr. Goldberg's letter and the -- as I recall, I

1 sent both Goldberg's letter and the discharge summary to  
2 the prosecutor's office, as I said, but not to the Court.

3 Q. Okay. And what is it that you did  
4 forward to the Court?

5 A. Okay. The only thing I sent to the  
6 Court was a copy of Dr. Goldberg's letter.

7 Q. And generally speaking, why -- why was  
8 that? Why did you not forward the additional record?

9 A. I was trying to minimize the invasion,  
10 if you will, of Bill's privacy. I just thought this --  
11 this was going to be a very difficult time. I certainly  
12 thought that there was the potential that what I sent to  
13 the Court would become part of the public record, just  
14 because it's a court record.

15 And I wanted to minimize the -- the amount  
16 of information about him personally that I -- I disclosed.

17 Q. Based on all this information, did you  
18 forward a postponement of the October trial date?

19 A. Yes, in a -- in a formal -- well, the  
20 sequence was that after Ms. Burnes and I spoke, I -- I  
21 think later that day received either an email or a phone  
22 call from the judge's chambers, saying that the judge  
23 would like to have a telephone conference with counsel.

24 I think it was -- later in the week, I  
25 think it was Wednesday afternoon it was scheduled. So



1           that's in terms of scheduling, that's what happened.

2                       Q.   And after the telephone conference,  
3           did you file a document with the Court?

4                       A.   I -- I --.

5                       Q.   As an officer of the Court moving for  
6           a continuance of the October trial date?

7                       A.   Yes.

8                       Q.   And what was the basis for your  
9           request for a postponement of the trial date?

10                      A.   That my client had a serious medical  
11           condition that was potentially fatal and unlikely to  
12           resolve before the October date?

13                      Q.   Would you have forwarded these  
14           documents to the Court and the Government if you didn't  
15           believe them to be true?

16                      A.   No.

17                      Q.   Would you have filed a record, a  
18           docketed record with the Court based on your client's  
19           medical condition, if you didn't believe it to be true?

20                      A.   Certainly not.

21                      Q.   Was -- your request for a postponement  
22           of the trial, was that opposed by the Government?

23                      A.   It was not.

24                      Q.   And was your request for a  
25           postponement of trial granted by the Court?

1 A. It was.

2 Q. And was trial continued?

3 A. The trial was postponed, sort of,  
4 without a new date being scheduled because of the nature  
5 of the situation.

6 Q. Did you -- and the trial is continued,  
7 does the Court issue a formal order that lays that out in  
8 writing?

9 A. It does.

10 Q. Did you send that order to Defendant  
11 Merlino?

12 A. I -- well, my -- as I recall, my legal  
13 assistant sent both a copy of the motion that we filed  
14 requesting the postponement of the trial and a copy of the  
15 judge's order granting it together, either the day of the  
16 conference or the next day.

17 Q. Okay. Let's take a look at  
18 Government's One seventy-four. Do you recognize  
19 Government's One seventy-four?

20 A. I do.

21 Q. What is it?

22 A. This is an email on -- that -- that  
23 was sent and received on Friday, August 13th, 2021. It  
24 was sent by William Merlino and received by me.

25 Q. Okay.

1 MS. BURNES: The Government moves  
2 Government's Exhibit One seventy-four in evidence.

3 MR. GAMBURG: No objection.

4 THE COURT: Admitted.

5 MS. BURNES: And permission to publish to  
6 the Jury.

7 BY MS. BURNES: (Cont'g.)

8 Q. Mr. Borden, this is an email where --  
9 I want to start in the middle of the page with the August  
10 12th, 2021 at -- at two forty-three p.m. Can you --

11 A. Okay. Yup.

12 Q. -- tell the -- tell the Jury what's --  
13 what's depicted there?

14 A. Sure. This --.

15 Q. What was showed at the bottom. Yeah.

16 A. Sure. This shows that on August 12th  
17 at two forty-three, I sent an email -- doesn't say to  
18 whom, but I -- that I sent an email, the only text --.

19 Q. Is it -- if we scroll to the bottom of  
20 the page?

21 A. Well, it's on -- it's on the screen.  
22 The only text is my -- they call it a signature. It's not  
23 really a signature, but they call it a signature, which is  
24 my name and office address, which is automatically  
25 inserted in any email I sent.

1                   And then at the bottom of the page, it's --  
2                   it says that docket thirty-five, order continuing trial  
3                   dot P.D.F. is attached.

4                   Q.    Okay.  And -- and what does that  
5                   indicate to you?

6                   A.    That I attached a copy of the Court's  
7                   order, postponing the trial to this email.

8                   Q.    Okay.  And now going to --.

9                   A.    Or to the August 12th email that I  
10                  sent.

11                  Q.    And going back to the top of the page  
12                  now.

13                  A.    All right.  And top of the page is an  
14                  email from William Merlino to me on Friday, August 13th at  
15                  seven thirty-six a.m.  And the text of that is, thank you,  
16                  sent from Dr. Bill's iPhone.  And that's a reply to the  
17                  email where I sent the order and motion.

18                  Q.    Okay.  And that's Friday, August 13th  
19                  of 2021?

20                  A.    It is.

21                  Q.    Did you have any communication with  
22                  your former client during the fall of 2021?

23                  A.    I don't -- I don't believe I had any  
24                  conversation with Bill after, you know, after the 13th  
25                  until after the first of the year of 2022.

1 Q. Okay. So moving forward to the first  
2 of the year in 2022. What, if any, communications did you  
3 have with your former client?

4 A. Well, I -- I called him sometime  
5 shortly after the first of the year, because it was my  
6 recollection and it's -- it's not in any court order or  
7 anything, but was my recollection that the judge had  
8 remarked that he would like to, sort of, have a status  
9 report, for lack of a better term, after the first of the  
10 year.

11 Q. Okay.

12 A. And so I called Bill, both to see how  
13 he was on a personal level, and also to say that I, you  
14 know, probably would need to report to the Court soon, and  
15 wanted to check in, see how he was, you know, how are  
16 things going, that sort of thing.

17 Q. And shortly after that call, did --  
18 did you receive a call from the prosecuting officer on the  
19 case?

20 A. Right. I received a call from Ms.  
21 Burnes within a few days of that, you know, saying --  
22 asking essentially, the same thing is, sort of, where --  
23 where things stand with Dr. Merlino.

24 Q. And after you received that call, what  
25 did you do?

1           A.    I -- I communicated with Bill, I think  
2           by email, and I guess, I should go back.  When I spoke to  
3           him first, after the first year, I -- I remarked that it  
4           would probably be helpful to have some kind of update  
5           again from his physician, not just a report from me, so  
6           that he should not rush, but try to get in touch with Dr.  
7           Goldberg and get him to send him some sort of summary of  
8           Bill's current condition.

9           And he said he would do that.  So I then --  
10          after I spoke to Ms. Burnes somewhere in the first week of  
11          the New Year, I wrote an email to Bill saying, you know,  
12          you probably should get that report from Dr. Goldberg  
13          sooner rather than later.

14          Q.    And -- and did you get a report from  
15          your -- your client in response to that email, that  
16          request?

17          A.    I did.

18          Q.    Let's take a look at Government's One  
19          seventy-five and Government's One seventy-five is -- is  
20          likewise an -- an email thread.  Is -- is this the -- the  
21          email thread that you just testified about?

22          A.    It is.

23          Q.    And did it come off of the E.D.?  Did  
24          it come off of your office computers in -- in response to  
25          the grand-jury subpoena?

1 A. It did.

2 MS. BURNES: The Government moves  
3 Government One seventy-five.

4 MR. GAMBURG: (unintelligible) subject to  
5 the other witness's (unintelligible).

6 THE COURT: (unintelligible) it up later,  
7 yes. Admitted.

8 BY MS. BURNES: (Cont'g.)

9 Q. So let's -- let's take a look at the --  
10 -- at the middle part of the email at eleven thirty-two  
11 a.m.

12 A. Okay.

13 Q. What's -- what's depicted there?

14 A. That is my email of January 6th at  
15 eleven thirty-two a.m. to Bill, saying Bill just got a  
16 call from Burnes. So I think it would be good to get that  
17 letter, if you would, at --.

18 Q. And is -- is that a -- a reference to  
19 the -- to the discussion you just described?

20 A. It is.

21 Q. Okay. And looking at the top header,  
22 what's -- what's depicted on that header?

23 A. That -- that's says it's an incident --  
24 -- email from Bill Merlino to me, re update, the date of  
25 the email is January 8th, 2022 at ten fifty-two in the

1 morning, and there's an attachment Goldberg letter to dot  
2 P.D.F.

3 Q. Okay. Now did Merlino's email to you  
4 contain any other text on the -- on the face of the email?

5 A. Did not.

6 Q. Okay. Did it contain an attachment?

7 A. It did.

8 Q. And directing your attention to page  
9 two of the attachment that page two of Government's One  
10 seventy-five. Is -- is this the attachment to the email?

11 A. It is.

12 Q. And let's -- let's take a look at the  
13 -- at the letterhead. Is it the same doctor that -- that  
14 we looked at on the -- on the August 6th letter?

15 A. It is.

16 Q. Okay. And directing your attention  
17 then to the -- to the date and the sender of the letter.  
18 What's the date of this letter?

19 A. Date is January 7th, 2022. And the --  
20 it's addressed to William A. Merlino, M.D.

21 Q. And is -- is otherwise it's  
22 (unintelligible) and the D.X. Are they the -- the same  
23 content as -- as the first letter?

24 A. Yeah, I believe, it is without  
25 comparing, but I -- I recall it is, yes.



1 Q. So let's -- let's take a look at -- at  
2 this letter. Is this letter signed?

3 A. Well, there's no handwritten  
4 signature, no.

5 Q. Okay. And who is this letter  
6 addressed to?

7 A. It's addressed to Bill Merlino.

8 Q. And -- and who is the salutation  
9 addressed to?

10 A. Oh, reads to whom it may concern.

11 Q. And what is the -- the di -- the  
12 content of this letter? The diagnose?

13 A. Sure. It says the -- that the current  
14 diagnosis is adenocarcinoma of pancreas. It says that the  
15 present status is metastatic -- lesions to vertebral spine  
16 and pelvis. That the current treatment is palliative, and  
17 it reads, please contact me directly on my cell phone with  
18 a phone number, if you require additional information.

19 Q. Okay. And were you expecting to  
20 receive information of this sort from your client?

21 A. Yes.

22 Q. At any point in time, did you tell him  
23 to create a document?

24 A. No.

25 Q. When you've requested records and

1 information from him, did you tell them to -- fabricate  
2 the record?

3 A. Absolutely not.

4 Q. Tell him to fake a record?

5 A. Nope.

6 Q. When you -- when you received the  
7 letter that's attached to Government's One seventy-five,  
8 what did you do with it?

9 A. I attached it to, I believe a letter.  
10 Yes, a letter to the Court with a copy to the Government.  
11 And I -- the substance of the letter was that I was  
12 updating the Court on Dr. Merlino's condition and then I  
13 requested a further continuance of the trial date.

14 Q. Was that request granted?

15 A. It was not.

16 Q. Did you receive information that Dr.  
17 Goldberg had no patient by the name of William Merlino?

18 A. I did.

19 Q. And shortly after that, did you  
20 withdraw from your representation?

21 A. Shortly after that, I filed a motion  
22 to withdraw, which is what's required. You can't just say  
23 you're not representing somebody anymore. You need to --  
24 to file a request with the Court, and that was eventually  
25 granted.

1 Q. Did you believe Merlino had been  
2 diagnosed with pancreatic cancer when you forwarded these  
3 records to the Court?

4 A. I certainly did.

5 Q. Would you have supplied that  
6 information to the Court and the Government if you didn't  
7 believe it to be true?

8 A. Certainly not. I mean, it did --  
9 didn't occur to me that somebody would -- would say that  
10 if it wasn't true. I mean, I -- I just did -- didn't  
11 cross my mind.

12 Q. Did you ever tell Merlino to fabricate  
13 documents and a diagnosis in order to get the trial  
14 postponed?

15 A. I did not.

16 MS. BURNES: I have nothing further, Your  
17 Honor.

18 CROSS EXAMINATION

19 BY MR. GAMBURG:

20 Q. So you -- you re-funded on his fee,  
21 right?

22 A. I don't think there was any -- any  
23 refund thereafter, no.

24 Q. Because you were trying to get more  
25 money prior to trial, right?

1           A.    I -- yes, we -- I had sent him a  
2           number of communications including a budget during the  
3           summer about -- to ask him to supply us with further  
4           retainer deposits, yes.

5           Q.    Did you provide that to Ms. Burnes?

6           A.    I did.

7           Q.    You did? Okay. I'll deal with that.

8           A.    Okay.

9           MS. BURNES: I -- I will -- everything that  
10          was supplied to Mr. Borden during the course of --

11          THE WITNESS: Okay.

12          MS. BURNES: -- discovery was provided to  
13          the defense.

14          MR. GAMBURG: I'll deal with that.

15          THE WITNESS: Yeah, I -- I thought I did.  
16          If I didn't --.

17          BY MR. GAMBURG: (Cont'g.)

18          Q.    You -- you -- you wanted substantial  
19          money, right?

20          A.    Yes.

21          Q.    To try the case, correct?

22          A.    Yes, yes, yes.

23          Q.    And it's your practice, when you make  
24          a continuance request to advise your Defendant, sent him a  
25          copy of it, right?

1 A. Yes, of the motion. Yes.

2 Q. All right.

3 MR. GAMBURG: I'll mark this as D One with  
4 the Court's permission.

5 THE COURT: You may.

6 MR. GAMBURG: Judge, I have a copy for the  
7 Court. I have a copy for counsel.

8 MS. BURNES: Thank you.

9 BY MR. GAMBURG: (Cont'g.)

10 Q. Sir, I'm showing you what I've marked  
11 as D One.

12 A. Yes, sir.

13 Q. Take a look at it. Is this a true and  
14 correct copy of your motion to continue the trial that was  
15 filed on July 26th of '21?

16 MS. BURNES: Objection. Perhaps that's the  
17 (unintelligible) copy, sir. I have document thirty-one.

18 THE COURT: I have document thirty. So I -  
19 - I think --.

20 MS. BURNES: Okay.

21 MR. GAMBURG: I'm sorry.

22 THE COURT: Just the --.

23 MS. BURNES: Do you need this one?

24 MR. GAMBURG: No.

25 THE COURT: Just the photocopy switch.

1 MS. BURNES: Okay. Yeah, I -- I have  
2 document thirty-one.

3 MR. GAMBURG: Right. That -- that's the  
4 order. I'm sorry. Yup, that's your response. I  
5 apologize.

6 BY MR. GAMBURG: (Cont'g.)

7 Q. Did you have the opportunity to review  
8 that?

9 A. I did, yup.

10 Q. And you have a duty (unintelligible)  
11 to the Court, right?

12 A. I do.

13 Q. That means you got to be honest with  
14 the Court, right?

15 A. Absolutely.

16 Q. So -- and you told the Jury already  
17 that your practice is to send a copy of the motion to your  
18 client, right?

19 A. Yes, I would say that's true.

20 Q. And you've (unintelligible), you know,  
21 for fifteen years, right?

22 A. I have. About that, yup.

23 Q. Never been at trial before, never had  
24 criminal proceedings against you, right?

25 A. Certainly not.

1 Q. His entire life's work is on the line,  
2 right?

3 A. Certainly, my belief, yes.

4 Q. Okay. So in your motion to continue  
5 to trial, you advised the Court that trial was scheduled  
6 to commence on Monday, October 25th, correct, of 2021?

7 A. Correct, yeah.

8 Q. And again, this was filed back in  
9 July. So August, September, October, three months, right?

10 A. Yup.

11 Q. Prior to the trial date.

12 A. Uh-huh.

13 Q. Do you agree?

14 A. Yes.

15 Q. You said that you had a case that was  
16 scheduled to begin on September the 13th, right?

17 A. Yup.

18 Q. Did that case go to trial?

19 A. It did go to trial.

20 Q. Okay. You then estimated the length  
21 of the trial, correct?

22 A. Well, I said that -- I said that the  
23 Government estimated that that trial would take a certain  
24 length of time.

25 Q. Sure. And then on the next page, your

1 -- the Merlino matter before this court is a complex  
2 matter requiring a thorough preparation, right?

3 A. Correct.

4 Q. So you told the Defendant you owe me a  
5 bunch of money and I'm not prepared for trial, right?

6 A. No, I didn't -- I didn't say that.

7 Q. You asked the Court to continue the  
8 trial date. Didn't you?

9 A. I did. But this is --.

10 Q. The reason why you asked the Court  
11 that the trial -- to continue the trial date is you had a  
12 complex matter that was going to trial in September,  
13 right? Yes?

14 A. That was one of several reasons, yes.

15 Q. Well, the other reason was that the  
16 Merlino matter required -- this complex matter requiring  
17 thorough preparation.

18 A. Yup.

19 Q. Meaning that you weren't prepared.

20 A. Well, it -- it doesn't mean that I  
21 wasn't prepared. But this is -- this motion was filed,  
22 let's see. July 26th.

23 Q. Right. We went through that. Three  
24 months.

25 A. So -- so was I fully prepared to start



1 the Merlino trial on July 26th? No.

2 Q. Okay. So that -- so you moved the  
3 Court for continuance?

4 A. Because I thought, just to be clear, I  
5 thought that the other trial, the trial in New Jersey  
6 which was also complex would take a long time, might go up  
7 to -- might take as long as to be very close to the start  
8 of the Merlino trial.

9 Q. Okay.

10 A. And -- and therefore, I would need  
11 more time.

12 Q. You told the Court, Judge McHugh that  
13 Judge Wilson, who is the chief judge in the District of  
14 New Jersey, had scheduled trial dates through October  
15 15th, correct?

16 A. Correct. That's true. Yup.

17 Q. And trial in this matter was October  
18 25th, leaving -- leaving a ten-day window?

19 A. Correct.

20 Q. But you essentially told the Court  
21 that I need a continuance because it's a complex matter  
22 requiring a thorough preparation.

23 A. True, yup.

24 Q. So in your communications with Dr.  
25 Merlino, you basically said, look, you owe me a bunch of

1 money to try this case, right? And I'm not going to be  
2 prepared for it.

3 A. No, I didn't say you owe me a bunch of  
4 money. I said, here is my estimate of the amount of time  
5 and the expenses that will be incurred to prepare for  
6 trial. And asked him to get back to me with what -- what  
7 his thoughts were in terms of payment arrangements.

8 Q. Wasn't that part of your initial fee  
9 agreement?

10 A. I -- the -- no, there was not a  
11 specific term in the initial fee agreement about the total  
12 fee.

13 Q. You agreed to undertake representation  
14 of an eighty-four-year-old doctor in a criminal matter,  
15 the most serious matter there is -- and -- and there's no  
16 set fee?

17 A. Oh, absolutely. I mean, my fees  
18 mostly -- almost always depend on the amount of time  
19 spent.

20 Q. Right. And --.

21 A. So -- so --.

22 Q. Forty-five years of practice, you know  
23 how much time is going to be spent getting ready for this  
24 case?

25 A. Oh, Lordy, no, I wouldn't have any --

1           any idea. The -- the -- any number of things could happen  
2           between when my representation of Dr. Merlino in this  
3           matter began years before. And when we went to trial,  
4           that would have either added to or subtracted from the  
5           amount of time and expense involved.

6                     Q.    You commenced your representation  
7           after he was indicted, correct?

8                     A.    On this matter, no. I commenced my  
9           representation well before he was indicted.

10                    Q.    So you even knew what was going on  
11           before he was formally charged?

12                    A.    Sure.

13                    Q.    You knew what they would say?

14                    A.    Yes.

15                    Q.    You had some exchange and some  
16           discovery with Ms. Burnes?

17                    A.    We did, and we actually, as I recall  
18           Dr. Merlino and I actually met with --.

19                    Q.    So you knew exactly what was involved  
20           pre-indictment. He gets indicted prior to the pandemic.

21                    A.    Yes.

22                    Q.    And you had already told us, which we  
23           all know, virtually everything stopped for at least a few  
24           months, right?

25                    A.    More than that, yup.

1 Q. And then at -- at least with respect  
2 to the Courts, they started doing some virtual work trying  
3 to open things up because you got criminal defendants who  
4 have rights, correct?

5 A. Absolutely.

6 Q. But no live trials, right?

7 A. Well, there were no live trials and  
8 there were no, to my knowledge, there were no video  
9 criminal trials.

10 Q. Right. But, you know, the Government  
11 was working remote. Some of us were working remote. Some  
12 of -- everyone else was working remote, right? Yes?

13 A. Yes.

14 Q. And again, you told us that the actual  
15 formal charging documents -- the indictment, that occurred  
16 prior to the pandemic, right?

17 A. Correct.

18 Q. So that I imagine the Government Ms.  
19 Burnes very, very diligent with her work. I would  
20 imagine that the Government gave you all the discovery,  
21 right?

22 A. They gave me all the discovery shortly  
23 after the indictment, yes.

24 Q. Sure. So you had months and months  
25 and months and months of no court, no live appearances,

1           plenty of time to prepare the case, right?

2                   A.    Yes, I think that's fair.

3                   Q.    And then certainly by that time, you  
4           knew what was involved and you knew what would be involved  
5           that the case had to go to trial, right?

6                   A.    I think that's fair.

7                   Q.    Okay. And it's still no detailed fee  
8           agreement as to how the payments were going to be made,  
9           right?

10                  A.    That is correct. There're reasons for  
11           that, but that's correct.

12                  Q.    Okay. So now, the motion is filed to  
13           continue the October 25th trial date for the reasons that  
14           we already covered. Ms. Burnes, on behalf of the  
15           Government responds and you will agree with me that on  
16           August the 3rd of 2021, this honorable court issued an  
17           order denying your motion for a continuance. Do you agree  
18           with that?

19                  A.    I agree.

20                  Q.    And the judge indicated that although  
21           certainly, and I can attest to it, he -- he strives to  
22           accommodate counsel given the environment, the pandemic  
23           environment, the trial listings are scarce and he did not  
24           want to waste any resources. Is that correct?

25                  A.    Correct.

1 Q. And you communicate that to Dr.  
2 Merlino, right?

3 A. I don't -- I don't know whether I  
4 communicated those words whether -- what I -- I'm sure I  
5 communicated was that the request to continue the trial  
6 had been denied. We discussed the motion before I filed  
7 it. And then I sent him the order denying that request as  
8 soon as I got it.

9 Q. Okay. And -- and you had known Dr.  
10 Merlino for fifteen years. Did you ever know him to have  
11 cancer?

12 A. No.

13 Q. Did you ever know -- have known him to  
14 be depressed?

15 A. I -- I -- I've never seen anything  
16 that suggested that to me.

17 Q. And you are a certified civil lawyer,  
18 correct?

19 A. I am.

20 Q. You've handled accident cases,  
21 personal-injury cases, right?

22 A. I have occasionally handled personal-  
23 injury cases, although they're not -- not many.

24 Q. Your firm handles them, right?

25 A. Oh, sure. Absolutely.

1 Q. Okay. And you have a -- a good  
2 relationship with other partners, associates in your firm,  
3 right?

4 A. I like to think so.

5 Q. You're familiar with medical records,  
6 right?

7 A. I mean, as you can tell, I'm sort of  
8 generally familiar with what's in a medical record, but  
9 I'm not -- I wouldn't say I'm -- that -- that's a  
10 strength. Let's put it that way.

11 Q. Okay. There's certainly people you  
12 can ask, right?

13 A. For sure.

14 Q. And within three days from a  
15 continuance being denied is when you first, according to  
16 you, received an unsolicited medical record from Dr.  
17 Merlino saying that he had pancreatic cancer?

18 A. It wasn't unsolicited. I mean, I  
19 asked him to send me medical records, so that I could  
20 supply them to the Court.

21 Q. Right. So July 26th continuous  
22 request, August 3rd denied. And then all of a sudden,  
23 according to you, phone call not email saying, hey, by the  
24 way, I have cancer. And then you said send me the  
25 records, right?

1           A.   Well, the phone calls in which he  
2           mentioned that he -- in which he said he had cancer was --  
3           was my phone call to him followed by -- or excuse me,  
4           which was after several phone calls wherein I tried to  
5           reach him.

6           Q.   And again, according to your  
7           testimony, you never thought, gee, this is kind of odd,  
8           continuance just got requested for the first time. My  
9           client that I've known for fifteen years says he's got  
10          cancer. Didn't think anything of that, right?

11          A.   Well, I thought a great deal of it.

12          Q.   I mean, honestly, you're happy because  
13          now you can re-apply for the continuance before Judge  
14          McHugh and get this thing pushed off, so you can get your  
15          money squared away and your other trial squared away?

16          A.   No, I was not, in any sense, happy.

17          Q.   Okay.

18          A.   All right.

19          Q.   I'm sorry, I didn't want to interrupt.  
20          Bill had become not a great friend, but a friend. We had  
21          dinner together once or twice. I -- I liked him as a  
22          person. It -- in no sense was I happy about hearing that  
23          he had pancreas -- had pancreatic cancer.

24          MR. GAMBURG: Can we put up G One seventy-  
25          one, please? The third page of the exhibit? And if -- if



1 we can if we can -- and thank you. If -- if we can  
2 highlight just that top part, the discharge summary and  
3 the admission date? Great. Thank you.

4 BY MR. GAMBURG: (Cont'g.)

5 Q. So you say it's your practice to -- to  
6 communicate, and then in this case, you did communicate  
7 your continuance requests to the Court, right?

8 A. Yeah, I communicate -- well, certainly  
9 I communicated my continuance requests to the Court. But  
10 I -- I also told Bill that I would be doing it.

11 Q. okay. And you'd spoken to him, right?

12 A. Yes.

13 Q. Okay. And this discharge document, as  
14 an admission date of August the 1st of '21, right?

15 A. That's what it says.

16 Q. Prior to your continuance being  
17 denied.

18 A. Yes.

19 Q. It has a discharge date of August 5th,  
20 '21 after the continuance was denied, right?

21 A. I think that -- I just don't recall  
22 the exact date when the continuance was denied.

23 Q. You were asked to go through this  
24 document without objection. Isn't that what it says,  
25 August 5th, 2021?

1 A. Oh, absolutely, yes. I just --.

2 Q. So you didn't think, gee, my friend,  
3 my client of fifteen years the guy that I have dinner with  
4 a couple of times, he was in the hospital when I made the  
5 continuance request. And he didn't call me. He didn't  
6 say, hey, you know, listen, man, forget about your  
7 continuance request for lack of preparation. I'm in the  
8 hospital.

9 A. Okay. Well, I -- he wasn't by -- by  
10 this document or anything else. He wasn't in the hospital  
11 when I made the request. I made the request, the exhibit  
12 you gave me on July 26th, 2021.

13 Q. I -- I understand that. What I'm  
14 saying to you, sir, is that when you look at what he sent  
15 you, it has an admission date and a discharge summary.

16 A. I see that.

17 Q. And you didn't say hey, what about the  
18 continuance (unintelligible)? You got cancer, man? What  
19 are you worried about?

20 A. Well, I'm not sure I understand the  
21 question, but no, I didn't -- first of all, I did not take  
22 note of the admission date. I'll tell you that. When I  
23 looked at this document, I didn't --.

24 Q. Sure.

25 A. I didn't take note that he had been

1 admitted that it said he had been admitted on August 1.

2 Q. So you've given this document to an  
3 attorney for the United States Government. You're then  
4 going to follow-up and submit something to a United States  
5 District Court Judge. You didn't take notice of that?

6 A. I did not.

7 Q. Did you take notice if we can  
8 highlight the H -- well, first of all, we can highlight  
9 the H.P.I. in hospital for us. Did you take notice that  
10 it says, he is very pleasant fifty-six-year-old Caucasian  
11 male?

12 A. I did note that.

13 Q. So then, either yourself or you go to  
14 one of your partners that does this kind of work or the  
15 associates, hey man, can I have a medical authorization  
16 that I cannot sign and I'm going to have someone write it  
17 down to Shore Memorial because I -- I like Merlino.

18 But sometimes these clients go off the  
19 wall. Let -- let me go independently verify that he was  
20 in the hospital by the simple expediency of filling out a  
21 medical authorization.

22 A. If -- you're asking whether I did  
23 that? I did not and it did not occur to me to do that.

24 Q. Did you think it was odd?

25 A. The -- the age discrepancy? I -- I

1           did think it was odd, but I also have seen lots of medical  
2           records where the gender of the patient is wrong.

3                   Q.   Including this one?

4                   A.   Including this one, yes.

5                   Q.   Okay.

6                   A.   So it's -- I just know that that  
7           happened.

8                   Q.   So the age is off by twenty-eight  
9           years (unintelligible) into dangerous territory, but for  
10          lack of a better word, the gender was wrong, right?

11                  A.   Yes.

12                  Q.   You've known him for fifteen years.  
13          You already told us that you knew of no past medical  
14          history of basal cell carcinoma or any other cancer,  
15          right?

16                  A.   I didn't, but -- but I've had basal  
17          cell carcinoma. And I didn't tell Bill. So I don't --.

18                  Q.   Hope you're not looking at your  
19          medical records. We're looking at his medical records.

20                  A.   I understand. But all I mean is basal  
21          cell carcinoma is not a -- it's a relatively common  
22          diagnosis that people who spend too much time in the sun  
23          get. And depression, you know, I wouldn't have expected  
24          Bill to, you know, tell me that every time he was  
25          depressed. So it --.

1 Q. Okay. So you didn't know about any  
2 past history of carcinoma? You didn't know any past  
3 history of depression, right?

4 A. Correct.

5 Q. After the discharge, there's an August  
6 6th letter from Dr. Goldberg, right?

7 A. Yup.

8 Q. Did you ever reach out and call Dr.  
9 Goldberg?

10 A. I did not.

11 MR. GAMBURG: Can we put up One seventy-  
12 two, please?

13 BY MR. GAMBURG: (Cont'g.)

14 Q. This is now August the 9th, correct?  
15 I know it's small, but ... thank you.

16 A. Yes, the date on this One seventy-two  
17 is August 9th.

18 Q. Now clearly, this is in response to a  
19 question from you.

20 A. It is.

21 Q. And what was the question?

22 A. Well, the question was -- well, what -  
23 - the conversation was that I mentioned to him that I had  
24 noticed that the record says that he's fifty-six. And  
25 obviously, that's not correct. Could he get that

1 corrected? And this was in response to that.

2 Q. Why -- why would you have him get it  
3 corrected rather than just go to the hospital or the  
4 doctor?

5 A. Because I thought he was in a much  
6 better position to do that. It's his -- it's his medical  
7 record. If there's an error in it, he could get it  
8 corrected quite easily. I get -- for me to get it  
9 corrected would require all kinds of bureaucracy.

10 Q. You wanted this case continued?

11 A. I wouldn't have moved to postpone it  
12 and -- if I did not think it was in Bill's benefit to have  
13 the case continued.

14 Q. And it's -- to Bill's benefit to get  
15 the case continued because you weren't prepared?

16 A. That's not the reason.

17 Q. So you asked him to correct the  
18 medical records, and in response, you received a corrected  
19 medical record, correct?

20 A. Correct. Sure.

21 Q. And still took no independent steps  
22 whatsoever to verify its -- for its truthfulness, correct?

23 A. You're right.

24 Q. Did you go to visit him? Did you go  
25 to talk to him? Did you see him in person? Sorry, let me

1 withdraw that.

2 Did you go to speak to him?

3 A. I didn't -- did not go to speak to  
4 him, no.

5 Q. Did you ask him to physically come  
6 into the office?

7 A. I did not.

8 Q. And it's fair to say for four months  
9 until January, you took no steps to either meet with Dr.  
10 Merlino or independently verify anything?

11 A. That's correct.

12 MR. GAMBURG: That's all I have, Judge.

13 MS. BURNES: A brief re-direct, Your Honor.

14 THE COURT: All right. You may.

15 RE-DIRECT EXAMINATION

16 BY MS. BURNES:

17 Q. Mr. Borden, the subpoena for records  
18 in this case, called for documents from June 2021 to  
19 January 2022. All records and communications regarding  
20 seeking trial continuances on behalf of William Merlino in  
21 19 C.R. seven one seven. Is that right?

22 A. It is.

23 Q. And that's because it's a narrowly  
24 tailored request because it's an unusual request to seek  
25 records from an attorney about his client?

1 A. That's correct.

2 Q. That subpoena didn't call for -- for  
3 fee information or the fee agreements. Did it?

4 A. It did not. And I, if I may, thinking  
5 about this since I've been sitting up here and after Mr.  
6 Gamburg's questioning, I -- I do recall that I made a  
7 decision that information concerning fee arrangements and  
8 budgets and that sort of thing, was not covered by the  
9 subpoena. And therefore, I did not produce that,  
10 documents related to that.

11 Q. Now, after your July request to  
12 postpone trial, based on your schedule, after that was  
13 denied. In your forty-five years of practice, have you  
14 had continuance requests denied?

15 A. Many -- yes, I certainly have.

16 Q. Would you have been prepared for trial  
17 in October -- or October 25th of 2021?

18 A. I would have been fully prepared.

19 Q. In your forty-five years of practice,  
20 have you tried cases back-to-back?

21 A. Certainly. Well, I've tried cases  
22 where -- the first trial wasn't even over that is the Jury  
23 was literally out deliberating and we started another  
24 trial.

25 Q. And describing to the Court that a --



1 a trial is -- is complex and requires communication. Is  
2 that -- is that standard language that you -- that lawyers  
3 use and that you use with respect to seeking a  
4 postponement of trial?

5 A. Yes, I mean, that said, I wouldn't --  
6 I wouldn't say if it wasn't true, but yes.

7 Q. In -- in a matter involving  
8 misbranding, for example.

9 A. Correct.

10 Q. You -- you testified that you've --  
11 you've known Merlino for fifteen years. Would you -- and  
12 that he was a friend.

13 A. Yes.

14 Q. Would you expect a friend to lie to  
15 you about pancreatic cancer?

16 A. Certainly not.

17 Q. And you've -- you've represented  
18 Merlino for several years as well?

19 A. I represented him on purely civil and  
20 business matters. No -- nothing like this.

21 Q. Would you expect a client to fake  
22 medical records about pancreatic cancer?

23 A. I would not.

24 MS. BURNES: Nothing further, Your Honor.

25 MR. GAMBURG: Nothing based on that, Your

1 Honor.

2 THE COURT: All right. Thank you, Mr.  
3 Borden. You may step down.

4 THE WITNESS: Thank you, Your Honor.

5 THE COURT: That brings us to our mid-  
6 morning break, members of the jury.

7 THE MONITOR: All rise.

8 THE COURT: Roughly ten minutes.

9 (JURY EXITS)

10 (Off the record; 10:59:56 to 11:13:05)

11 THE MONITOR: All rise.

12 (JURY ENTERS)

13 THE COURT: All right -- all right, you're  
14 prepared with another witness, Ms. Burnes?

15 MS. BURNES: Yes, Your Honor, the  
16 Government calls Dr. Robert Goldberg.

17 THE COURT: Proceed.

18 MS. BURNES: Watch your step as we go, Dr.  
19 Goldberg. Can you step this way. Watch your step, Dr.  
20 Goldberg. Please remain standing while you're sworn, Dr.  
21 Goldberg.

22 THE MONITOR: Please raise your right hand.  
23 Do you swear or affirm that the testimony you shall give  
24 to this court shall be the truth, the whole truth, and  
25 nothing but the truth, so help you God or you do so

1 affirm?

2 MR. GOLDBERG: I swear.

3 WITNESS; ROBERT GOLDBERG; Sworn

4 THE MONITOR: Thank you, please be seated.  
5 Please state your name for the record?

6 THE WITNESS: Robert M. Goldberg, M.D.

7 DIRECT EXAMINATION

8 BY MS. BURNES:

9 Q. Please have a seat, Dr. Goldberg. Dr.  
10 Goldberg, where do you work?

11 A. Somers Point, New Jersey.

12 Q. And how long have you been a  
13 practicing oncologist?

14 A. July 1st, 1980, just finished forty-  
15 two years and started my forty-third year of practice.

16 Q. I'm going to approach with what's been  
17 marked as Government's Exhibit One Eighty P. Can you  
18 identify what One Eighty P is?

19 A. Yes, this page is my letterhead from  
20 my office.

21 Q. Okay. And One eighty is on the  
22 screen.

23 MS. BURNES: The Government moves admission  
24 of Government's Exhibit One eighty and One eighty P.

25 MR. GAMBURG: No objection.

1 THE COURT: Admitted.

2 BY MS. BURNES: (Cont'g.)

3 Q. And Dr. Goldberg, let's just take a  
4 look at the -- at the top of the page here.

5 A. Yes.

6 Q. That's your letterhead. On the left-  
7 hand side of your letterhead, what -- what's depicted  
8 there?

9 A. Has my name Robert M. Goldberg M.D.  
10 and I am a diplomat of the American Board of Internal  
11 Medicine, that is I'm board certified in both medical  
12 oncology sub-specialty and in general internal medicine.

13 Q. And in the center of the page, your --  
14 your full name?

15 A. Yes, it has my name -- actually it has  
16 the name of the practice, my name -- the name of the  
17 practice is Robert M. Goldberg M.D. P.A., Professional  
18 Association, which means I'm incorporated and practice is  
19 limited to medical oncology and hematology.

20 Q. What is that -- one moment, sir.

21 A. And -- go ahead.

22 Q. What does that mean, that your  
23 practice is limited to medical oncology and hematology?

24 A. I don't -- although I'm broad  
25 certified in general internal medicine, I don't treat

1 people with diseases such as diabetes, heart disease,  
2 emphysema. I'm qualified to do that but I limit my  
3 practice only to folks who have malignant diagnoses and  
4 blood disorders.

5 Q. Okay. And so oncology is the  
6 malignant diagnosis of cancer?

7 A. Medical -- medical oncology is the  
8 medical management of patients who have cancers, malignant  
9 diseases, tumors, leukemia, lymphomas, myelomas.

10 Q. And what's hematology?

11 A. Hematology specializes in blood  
12 disorders, there's a crossover between that and medical  
13 oncology, but it also covers problems like low blood  
14 counts or high blood counts, bleeding disorders, clotting  
15 disorders.

16 Q. And Dr. Goldberg, does your letterhead  
17 have your office address and the office phone number?

18 A. There is the office address right  
19 there, the phone and also my fax number.

20 Q. Dr. Goldberg, do you have a patient  
21 named William Merlino?

22 A. No, I never have, I do not nor have I  
23 ever had a William Merlino.

24 Q. Have you ever treated William Merlino  
25 for cancer?

1                   A.    No, I've never treated William Merlino  
2                   for cancer or for anything.

3                   Q.    Now, in -- in your office area as a  
4                   practicing physician in Somers Point, New Jersey, are you  
5                   familiar with a Dr. William Merlino?

6                   A.    I've known of him in practice, I  
7                   believe, he has retired. I actually had not seen, spoken,  
8                   been in his presence for probably fifteen, twenty years  
9                   and I -- I know he practiced out in the Mays Landing area.

10                  Q.    Without disclosing anything  
11                  substantive, did -- did you have a patient who was a  
12                  family member of Dr. Merlino?

13                  A.    That is correct.

14                  Q.    And how is it that you came to have  
15                  this patient as part of your practice?

16                  A.    I have -- I -- I looked at the chart  
17                  and I saw the referral had been made by the -- referring  
18                  was Dr. William Merlino.

19                  Q.    Now, is it your practice when you  
20                  receive a referral --

21                  A.    Yes.

22                  Q.    -- from another doctor, what, if  
23                  anything, is -- is your practice to acknowledge that?

24                  A.    I'm sorry, could you say that again  
25                  what?

1 Q. Do you have a practice acknowledging a  
2 referral from another doctor?

3 A. Yes, a letter is -- I generate a  
4 letter on this letterhead, dear doctor, so and so, I met  
5 your patient so and so today in office consultation and I  
6 go over the history of what the patient presented with,  
7 the physical findings on my physical examination,  
8 laboratory findings that are present, also imaging X-ray  
9 scans, M.R.I.s, CAT scans and below that comes a paragraph  
10 that is impression what I think is going on and  
11 recommendations, what to do about it.

12 Q. Did you follow that practice with  
13 respect to the patient referred to you by Dr. Merlino?

14 A. Yes, and with every patient, I must  
15 add.

16 Q. If we can take down One-eighty. I  
17 want to show you -- direct your attention to what's been  
18 marked as Government's Exhibit One seventy-one and we'll  
19 look at page two. So it should appear on your screen.  
20 I'm going to approach and put it in your binder as well.

21 A. Yes. All right, thank you.

22 Q. One seventy-one, page two at the top  
23 of the page says Robert M. Goldberg M.D. P.A. Is that the  
24 name of your practice?

25 A. That is correct.

1 Q. Did you write this letter, sir?

2 A. No, I did not write that letter.

3 Q. Let's take a look at -- at the

4 letterhead on one seventy-one P two.

5 A. If you notice on the second line, it  
6 starts limited to medical oncology and hematology, my  
7 genuine letterhead says practice limited to medical  
8 oncology, this is not my letterhead.

9 Q. And is -- is the font different on one  
10 seventy-one page two than one -- your genuine letterhead,  
11 that is one-eighty?

12 A. Yes, that is correct because where the  
13 genuine letterhead is all capitalized and this just has  
14 capital letters on the beginning of each word and is not  
15 capitalized.

16 Q. And on your genuine letterhead at  
17 Government's Exhibit One eighty, the acknowledgment of --  
18 of your certification. Does that appear on Government's  
19 One seventy-one, page two?

20 A. No, it certainly does not.

21 Q. Let's take a look and -- and fair to  
22 say that prior to being shown this -- this August 6 letter  
23 by the Government, had you ever seen it before?

24 A. No, this is --.

25 Q. Let -- let's take a look at that --



1       let's take a look at the substance of the letter. Do you  
2       see that there is a line on the August 6 letter that  
3       begins with D.X.?

4                   A.    D.X. Carcinoma of Pancreas T3A-N2-M5.

5                   Q.    What if anything does that mean to  
6       you?

7                   A.    It means whoever wrote that didn't  
8       know what they were writing because there is no such  
9       entity as M5, we use a stage -- we use a nationwide  
10      international staging system for cancer call the T for  
11      Tumor, the N for Lymph nodes, and the M for the spread of  
12      distant disease call Metastasis.

13                   If there is cancer elsewhere in the body,  
14      it is M1, if there is no cancer elsewhere it's M0, there  
15      is no M2, M3, M4, M5, that is fraud.

16                   Q.    Dr. Goldberg, if we can pull back on  
17      the letter let's -- let's take a look at the bottom of the  
18      page. Does it appear to have a signature?

19                   A.    Yes, it does.

20                   Q.    Is that your signature, Dr. Goldberg?

21                   A.    That is not my signature.

22                   Q.    And if we can pull back out and take a  
23      look at the contact line?

24                   A.    I have no idea what that cell phone  
25      number is, but it is not my cell phone number.

1 Q. Okay. So if I just may ask the  
2 question then. Is that your cell phone number?

3 A. That is not my cell phone number.

4 Q. Now, Dr. Goldberg, I want to show you  
5 another doc -- document that's already been marked and  
6 admitted into evidence. This is Government's One seventy-  
7 five P two. And if we can acknowledge that for the doctor  
8 top half the page. Dr. Goldberg, did you write this  
9 letter dated January 7th --

10 A. No, I did not.

11 Q. -- of 2022?

12 A. No, I did not write this letter.

13 Q. With respect to the letterhead at the  
14 top of the page. Is that your letterhead?

15 A. That is not my letterhead.

16 Q. With respect to the diagnosis in the  
17 middle of the page, does it contain the same error that  
18 you just described?

19 A. The same error that I just went  
20 through before.

21 Q. And to the -- to the middle of the  
22 page where it says please contact me. Is that your cell  
23 phone number ending eight zero zero two?

24 A. That is not my cell phone number.

25 Q. And finally, Dr. Goldberg, is this

1 letter signed?

2 A. No, it -- not only it is not signed  
3 but when I finish a letter at the bottom is Robert M.  
4 Goldberg, M.D. in this letter there is a new paragraph --  
5 two spaces between Robert M. Goldberg M.D. and right below  
6 it R.M.G./dragon dictate which is my dictation system and  
7 when I dictate letters as I was doing even yesterday, it's  
8 immediately below the Robert M. Goldberg, M.D., not two  
9 spaces below.

10 Q. Prior to being shown this letter by  
11 the Government, have you ever seen it before?

12 A. Not until the Government contacted me  
13 with in -- in January that was the first when they  
14 contacted me and I said what's going on here.

15 Q. Okay. And -- and at that time were --  
16 were you advised that there was inquiry about you -- your  
17 patient William Merlino?

18 A. That's when I first learned about  
19 this.

20 Q. And were you surprised by that call?

21 A. Surprised is an understatement.

22 Q. I want to direct your attention back  
23 to Government's Exhibit One seventy-one, page three. And  
24 generally, so as we take a look at the -- at the top of  
25 the page -- the top of page three. Do you practice in

1 Shore Medical Center?

2 A. Yes, I am happy to say, I've been  
3 president of the medical staff there, set up the division  
4 of medical oncology one -- after I arrived in 1980 from  
5 Fox Chase and my office is one block away.

6 Q. And with respect to the -- the  
7 document that -- that's depicted on -- on this page of  
8 Shore Medical Center records, is there anything that  
9 appears unusual to you with this?

10 A. Yup, just starting at the top, there  
11 is a typo and the individual's first name is lowercase. I  
12 have never in forty-two years seen that type of typo, this  
13 would be the first time ever seen just that it hit me,  
14 just looking at it like that.

15 Q. And directing your attention to the --  
16 to the -- to the bottom of the page, the primary-care and  
17 the consulting provider if we can take a look at that?  
18 Are you familiar with individuals who have those -- those  
19 names?

20 A. Primary -- it -- there is an  
21 individual in Somers Point with a surname of McMurray but  
22 it is Anne, A-N-N-E McMurray and she is either a nurse  
23 practitioner or an advance, either an N.P. or an A.P.N.  
24 and not an M.D. or a D.O.

25 Q. And we can take that down. Dr.

1 Goldberg, you actually do treat patients for cancer, is  
2 that right?

3 A. That's all I do basically and  
4 hematology, yes.

5 Q. And among cancer diagnoses, how  
6 serious is a pancreatic cancer diagnosis for a patient and  
7 their loved ones?

8 A. Pancreatic cancer is dreadful for --  
9 the beginning reason is there are no early warning signs.  
10 There is no effective screening as there is, for instance,  
11 with breast cancer with a mammogram with prostate cancer  
12 P.S.A. with lung cancer screening, sadly for pancreatic  
13 cancer -- by the time a person has symptoms of it, it is  
14 almost entirely too far gone to use the word curable sadly  
15 to say.

16 And the mortality of that is -- is  
17 dreadful. It's been dreadful when I started and sadly  
18 it's made slower progress than I would have loved to have  
19 seen.

20 Q. And when you say mortality, sir.

21 A. Death rate.

22 Q. Dr. Goldberg, having taken a look at  
23 these documents, how do you feel about your name, your  
24 practice area, and your credential venues being used  
25 without your consent?

1 MR. GAMBURG: Objection.

2 THE COURT: I'll sustain that.

3 MS. BURNES: I've nothing further, Your  
4 Honor.

5 MR. GAMBURG: No question, Judge.

6 THE COURT: Thank you, Dr. Goldberg. You -  
7 - may step down.

8 THE WITNESS: Excused?

9 THE COURT: You are, thank you.

10 MS. BURNES: Your Honor, the government  
11 calls Dr. Arthur Simone.

12 THE COURT: All right. Don't trip on that.

13 THE MONITOR: Please raise your right hand?  
14 Do you swear or affirm the testimony you shall give to  
15 this court should be the truth, the whole truth, and  
16 nothing but the truth, so help you God or you do so  
17 affirm?

18 MR. SIMONE: I do so.

19 WITNESS; ARTHUR SIMONE; Sworn

20 THE MONITOR: Thank you, please, be seated.  
21 Please state your full name and spell it for the record.

22 THE WITNESS: Arthur Simone, A-R-T-H-U-R S-  
23 I-M-O-N-E.

24 DIRECT EXAMINATION

25 BY MS. BURNES:

1 Q. Good morning, Dr. Simone.

2 A. Good morning.

3 Q. And in fact, I'm going to just close  
4 that binder in front of you. Can you tell the Jury your  
5 current job, sir?

6 A. I am a -- the senior medical advisor  
7 in the Office of Unapproved Drugs and Labeling Compliance  
8 at the Food and Drug Administration.

9 Q. And can you briefly describe your  
10 educational background?

11 A. I have a bachelor's degree in  
12 engineering science, a Master of Science and Doctor of  
13 Philosophy in bioengineering, medical degree, Doctor of  
14 Medicine, and a certificate in public health.

15 Q. And can you describe your early work  
16 experience that brought you to the F.D.A.?

17 A. Following medical school, I was on the  
18 faculty at the University of Pennsylvania as a practicing  
19 anesthesiologist. And actually before that, I did an  
20 internship in medicine and surgery at Presby Penn and then  
21 an anesthesia residency at Penn State, Hershey.

22 Then I started as a faculty member at Penn  
23 and then went into private practice in Montgomery County  
24 and became because of takeovers, a faculty member at  
25 Hahnemann M.C.P. and then ultimately Drexel. And then

1 after that I went to the Food and Drug Administration.

2 Q. What are your responsibilities as the  
3 senior medical advisor at the Office of Unapproved Drugs  
4 and Labeling Compliance?

5 A. My primary responsibility is to look  
6 at information that I'm provided to determine if a product  
7 qualifies as a drug, sometimes I'm asked if it also  
8 qualifies as a prescription drug and whether that product  
9 is either generally recognized as safe and effective or is  
10 it a new drug. And if it's a new drug, has it been  
11 approved.

12 Q. And how long have you had this job?

13 A. A little over six years.

14 Q. Have you had other jobs in the F.D.A.  
15 center for drug evaluation and research?

16 A. Prior to my current position, I was a  
17 clinical reviewer and medical officer in the Office of New  
18 Drugs which is the one that's responsible for approving  
19 new drug products in the Division of Anesthesia, Analgesia  
20 and Critical Care products.

21 Q. Dr. Simone, I want to ask you some  
22 questions about the F.D.A. regulation of human drugs. How  
23 long has F.D.A. and its predecessors regulated human  
24 drugs?

25 A. I would say technically since 1906



1           when congress passed the pure food and -- pure food and  
2           drug bill, pure food and drug act.

3                       Q.    And is -- is that what prohibited  
4           interstate commerce and (unintelligible) food and drugs?

5                       A.    Yes.

6                       Q.    Let's move forward then. Can you tell  
7           the Jury about the creation of the F.D.A. itself in the  
8           federal food and drug cosmetic act? What year was that?

9                       A.    That was 1938.

10                      Q.    And what -- what generally is required  
11           of drugs in the Federal Food and Drug Cosmetic Act of  
12           1938?

13                      A.    In 1938, one of the biggest elements  
14           of the act was that before a drug could be brought to  
15           market in the United States, it had to be proven to be  
16           safe for its intended uses.

17                      Q.    And act of safety in 1938, what are  
18           the amendments in 1962?

19                      A.    A number of things but one of the --  
20           the bigger ones was that before a drug could come to  
21           market in the United States, it had to be proven safe and  
22           effective for its intended uses.

23                      Q.    And what does effective for an  
24           intended use mean?

25                      A.    Basically, that the drug claim -- does

1        what it claims to do, so if it's a blood pressure medicine  
2        that it actually does lower blood pressure, cholesterol  
3        medicine actually lowers cholesterol, things like that.

4                    Q.    So when I just briefly asked you some  
5        key questions about the drug-approval process today, what  
6        are the key steps that a person or company has to do if  
7        they want to manufacture and market a drug in the United  
8        States?

9                    A.    The initial step would be to actually  
10       come up with the drug product, so you -- you find an  
11       ingredient that you think -- a new chemical that you think  
12       is going to do something to treat a disease. And then you  
13       make it into the drug form, this chemical is going to be  
14       put in a pill or some kind of liquid to be injected, and  
15       you develop that product and you set standards for it.

16                   And once you've gotten it to the point  
17       where you have the recipe for, what active ingredient,  
18       what inactive ingredients, the specifications for them how  
19       pure do they have to be, how you're going to manufacture  
20       it and just start to come up with the actual drug product.

21                   The second step is to start assessing its  
22       safety and that's done in animal studies and we have small  
23       groups of animals and they're given low doses of the drug  
24       and if they seem to tolerate it well and you analyze the  
25       animal, make sure it's not harming kidneys, liver, brain,

1 skin, heart, lungs.

2 Then you can get another group of animals  
3 and increase the dose and that's done until you either  
4 find some kind of a harmful effect, toxic effect as we  
5 call it or death.

6 And then once we have information -- and if  
7 -- animals actually can have the same disease as humans,  
8 you also look to see, does this drug actually work in  
9 animals and once you have that information then you come  
10 to the F.D.A., if you think you're ready to start doing  
11 studies in human beings.

12 Q. And -- and if -- what's the next step  
13 in the approval process then with F.D.A. after animal  
14 studies moving into human beings?

15 A. So the human studies are broken down  
16 into phases and there are four phases, three of which you  
17 complete before you seek approval. So the first phase is  
18 done with healthy volunteers and these are small groups of  
19 subject humans that are given different doses of the drug  
20 product to look at safety and effectiveness -- I'm sorry,  
21 safety and tolerability.

22 So it's kind of like the animal studies but  
23 now in humans and you keep doing that until you reach a  
24 point where the humans either do not tolerate it -- you  
25 know, you take the pill and it just gives you nausea or

1       vomiting, headache, whatever. And you said, I can't take  
2       this anymore or where you find some kind of toxicity, some  
3       kind of harmful effect.

4               So in humans you're -- you're evaluating  
5       lung function, heart, kidney, liver function, things like  
6       that, that's phase one. If you do that and you still  
7       think the drug is capable of going on, you enter phase  
8       two. Phase two is what we call dose escalation studies,  
9       so now you get people that actually have the disease you  
10      want to treat and you break them up into small groups.

11             And first group, you give a low dose of the  
12      drug to them and you see does it work -- does it lower the  
13      blood pressure, cholesterol, treat their infection and can  
14      they tolerate it. And if so, take another group and you  
15      go with a slightly higher dose. And what you're trying to  
16      do with these studies is typically the more drug you give,  
17      the more of an effect it will have, but the more drug you  
18      give the more side effects you have, the more harmful  
19      effects.

20             So you're trying to find that sweet spot in  
21      the middle where you get the most bang for your buck  
22      essentially. You'll have the most effect with the minimal  
23      amount of harm. And once you've identified that dose then  
24      you come to F.D.A. and say here's what we've got so far  
25      and -- and just to be clear up to this point, every time

1       you want do one of these studies a protocol is prepared,  
2       you know, here is what we're going to do, here's how we're  
3       going to do it, here's how we're going to protect our  
4       subject, all of that information is submitted to the  
5       F.D.A. We look it over and if we think it's not safe for  
6       them to proceed, we can stop the studies otherwise they  
7       proceed.

8                   Q.    And so what's the next step?

9                   A.    So phase three is a big trial. Now,  
10       I've identified this dose that I think is going to really  
11       work with the least amount of harm, I have to prove to the  
12       F.D.A. that this is going to be safe and effective for the  
13       intended use. So these studies are scientifically divide  
14       -- developed and designed to study that and prove usually  
15       within ninety-five percent certainty that the drug has the  
16       desired effect and these are large-scale studies, this can  
17       be hundreds to thousands of patients that are involved in  
18       it.

19                  Q.    So before a drug can be marketed or  
20       sold, in the United States needs to go through this  
21       approval process that you just described?

22                  A.    What happens when all the studies are  
23       completed, a company will submit what's called a new drug  
24       application to the Food and Drug Administration. And this  
25       application has all that information in it from

1 information regarding the -- the quality of the drug which  
2 is how they make it. Where do you get your ingredients  
3 from, how do you test those ingredients, where are you  
4 manufacturing this, we don't inspect those facilities,  
5 what are the standards you're using, how are you testing  
6 the final product to make sure it's as pure as it's  
7 supposed to be and has the right amount of ingredients,  
8 that's one part.

9 The animal-study information is provided  
10 and then the human-study information is provided. And the  
11 proposed labelling for the product is also provided.  
12 That's all part of the new drug application. And  
13 technically, F.D.A. doesn't approve an active ingredient  
14 and we don't approve a drug product.

15 It's the new drug application that we  
16 approve because that has all this information related to  
17 that product. And technically, nothing can change  
18 regarding that product without F.D.A. clearance first.

19 Q. Dr. Simone, so final approval involved  
20 more than just the active ingredient in the drug?

21 A. That's correct.

22 Q. Is that correct? Now, you mentioned  
23 labelling --

24 A. Yes.

25 Q. -- label and labelling, can you -- can

1           you explain to the Jury what a label is in this context?

2                   A.    So every drug product comes in, what's  
3           called an immediate container.  So if it's pills, it's the  
4           little jar with the pills in it.  If it's an injectable  
5           drug, it's that little vial that glass container that has  
6           the -- the drug itself in it.  The label is whatever piece  
7           of paper is adhered to that immediate container.

8                   Q.    And does -- is there certain  
9           information that needs to go on the label?

10                  A.    Yes.

11                  Q.    What type of information is that?

12                  A.    The name of the drug, the active  
13           ingredient or ingredients that are contained in the drug,  
14           the amount of those ingredients that are contained in the  
15           drug.  If it's a prescription drug, it has to have Rx only  
16           on the label.  The name of a manufacturer, package or --  
17           or labeler for the drug has to be on there.  Usually, a  
18           lot number or batch number has to be on there and an  
19           expiration date.

20                  Q.    When you make reference to the  
21           manufacturer, is that the manufacturer of some key  
22           ingredient or the manufacturer of the actual drug product?

23                  A.    Of the actual finished drug product.

24                  Q.    And -- and why is that?  Why is that  
25           F.D.A. needs to know where the drugs are actually

1 manufactured?

2 A. We needed a name of one of those  
3 entities so that if there's ever a problem with the drug  
4 and someone calls in, we know who to contact. So if I've  
5 taken a pill and, or if one of my patients takes the pill  
6 and dies and the family member says we had this drug for  
7 years and no problem.

8 I can call F.D.A. and say hey, we have this  
9 medication and this patient died. And they'll say well,  
10 who made it and what's the batch number and expiration  
11 date. And then the F.D.A. can actually go back to whoever  
12 is responsible for that product to see what's going on.

13 Q. So you've talked about the label  
14 placed on the container, can you tell the Jury what  
15 labelling is?

16 A. Labeling is any information that's  
17 provided by the -- the seller of the drug to the public  
18 and labelling includes the label.

19 Q. Okay. When you say information  
20 provided by the seller of the drug, can labelling include  
21 websites?

22 A. Yes.

23 Q. Can it include Twitter?

24 A. Yes.

25 Q. Can it include Facebook?



1 A. Yes.

2 Q. Can it include emails directly from  
3 the seller to the customer?

4 A. Yes.

5 Q. And is there a requirement that the  
6 labelling is truthful and not misleading?

7 A. Yes.

8 Q. Is that requirement for just the  
9 customer or for you at F.D.A.?

10 A. Can you rephrase that, please?

11 Q. Uh-huh. Is there a requirement that  
12 the labelling be truthful and not misleading to the  
13 regulator such as yourself at F.D.A.?

14 A. I'm still not sure I understand --

15 Q. Okay.

16 A. -- what you're asking.

17 Q. Sure, to the -- to the extent that you  
18 review labelling prior to approving any new drug?

19 A. Yes.

20 Q. Okay.

21 A. Yes.

22 Q. And is it important that -- that the  
23 labelling, meaning the website, the communication, all of  
24 the representation from the seller to the customer that  
25 they be truthful and not misleading?

1                   A.    Yes, but to be clear on one point  
2                   that's the initial labelling is reviewed by F.D.A. before  
3                   as part of the approval process, but after that any  
4                   misbranding or misrepresentation of the product is  
5                   something that F.D.A. is concerned about and will take  
6                   action on.

7                   Q.    Okay.  And --?

8                   A.    That's part of my labelling compliance  
9                   part of the office job.

10                  Q.    Okay.  And that's -- and that's part  
11                  of the -- that's part of your work?

12                  A.    Yes.

13                  Q.    Okay.  Can you tell the -- the Jury  
14                  you -- you said that you have to, at the Office of  
15                  Unapproved Drug and Labeling Compliance, you have to  
16                  determine whether a product is -- is a drug?

17                  A.    Yes.

18                  Q.    And -- and what's the initial steps or  
19                  analysis that you use?

20                  A.    Usually they'll provide me, they being  
21                  other members of my office or outside people, information  
22                  and it's the labelling for the product and based on the  
23                  intended uses that are listed in that labelling, I make  
24                  the determination as to whether or not it qualifies as a  
25                  drug.

1 Q. Okay. And it -- with respect to  
2 intended use, what -- what are the -- the two key intended  
3 usages that -- that you review?

4 A. Broadly speaking, I -- I look to see  
5 if it's making some kind of a disease claim and for  
6 disease claims we include whether this is intended to  
7 treat, diagnose, cure, mitigate or prevent disease. And  
8 the other type of qualifier for a drug is if it's  
9 something other than food that affects the structure or  
10 function in the body of man.

11 Q. Okay. And you said that you review  
12 labelling, is that correct?

13 A. Yes.

14 Q. Okay. So that includes the label  
15 that's on the container, but it also includes all of those  
16 other things you described, websites?

17 A. Yes.

18 Q. Advertisement?

19 A. As long as it's under the control of  
20 the person sell -- or the company selling the drug.

21 Q. Okay. As long as it comes from the  
22 person or company selling the drug?

23 A. Correct.

24 Q. Does a product in this -- in this case  
25 call 2,4-Dinitrophenol, are you -- and it -- it -- it's

1 commonly called D.N.P., are you familiar with D.N.P.?

2 A. On a high level, yes.

3 Q. Okay. And -- and what's your  
4 understanding of what D.N.P. is?

5 A. It's -- it's a chemical that -- that  
6 has a lot of use in industrial, or a lot of industrial  
7 purposes for its use, and it has been used occasionally in  
8 medicine.

9 Q. And when you say occasionally in  
10 medicine, how -- how long ago was it used occasionally in  
11 medicine?

12 A. Well, before the -- back in the 1800s  
13 -- but well before the pure Food and Drug Act.

14 Q. Okay.

15 A. Or the -- I'm sorry, the -- the first  
16 act for F.D.A. so --.

17 Q. And prior to the passage of the Food,  
18 Drug and Cosmetic Act that which -- which require drugs to  
19 be proven safe before they were marketing were the medical  
20 usage recorded of D.N.P.?

21 A. Yes, they were.

22 Q. Back in the thirties?

23 A. Yes.

24 Q. And what -- what historical issues  
25 were reported with D.N.P. back in the thirties?

1 A. When used for medical purposes --

2 Q. Yes.

3 A. -- the -- the typical medical purpose  
4 back then was weight loss. And it was also used  
5 industrially to -- to make munitions, explosives, it was  
6 used industrially as a dye, as a wood preservative and for  
7 film developing. So people that worked in those  
8 industries also had exposure to 2,4-Dinitrophenol and --  
9 and they experienced problems with it.

10 And those problems ranged from anything to  
11 blindness, trouble with body organs and death.

12 Q. And when -- when -- was D.N.P. one of  
13 the drugs considered by Congress before passing the  
14 federal Food and Drug Cosmetic Act in 1938?

15 A. Yes, the -- the Food and Drug  
16 Administration that - at that time was giving  
17 presentations to congress to talk about, these are the  
18 issues that we're seeing with products, here's -- here's  
19 the kind of action you need to take to help us basically  
20 do a better job, and 2,4-Dinitrophenol was part of that  
21 presentation.

22 Q. And -- and what, if anything, -- well,  
23 strike that. Are there any drugs approved in the United  
24 States containing D.N.P.?

25 A. Approved products, no. There -- there

1 has never been a product that's gone through the approval  
2 process and --

3 Q. Containing D.N.P.

4 A. -- containing -- yeah, 2,4-  
5 Dinitrophenol.

6 Q. Okay. And what would F.D.A. concerns  
7 be about unapproved D.N.P. being sold as a drug for human  
8 consumption?

9 A. Our concerns really haven't changed  
10 much since that presentation back in 1938. We did  
11 something that was called the chamber of horrors for  
12 congress where we talk about drugs and the risks  
13 associated with them and a concern for Dinitrophenol is  
14 that -- it's -- it has a significant amount of toxicity  
15 and a risk of death when used in humans.

16 Q. I have no further questions, Dr.  
17 Simone.

18 CROSS EXAMINATION

19 BY MR. GAMBURG:

20 Q. 2,4-Dinitrophenol was just approved  
21 for an N.D.A., wasn't it?

22 A. No.

23 Q. It was not?

24 A. No, it wasn't.

25 Q. Not by (unintelligible)?

1                   A.    No, it has not been approved for new  
2                   drug application.

3                   Q.    You sure?

4                   A.    I am sure.

5                   Q.    Do you want to step out for a second  
6                   and check with anyone?

7                   A.    I've already looked. To be clear that  
8                   company has submitted investigation on new drug  
9                   applications to the Food and Drug Administration. It has  
10                  not submitted a new drug application.

11                  Q.    Has -- has the testing been rejected?

12                  A.    I don't know that I'm allowed to speak  
13                  about that. That's considered proprietary information.

14                  Q.    It's proprietary. So the F.D.A. is  
15                  considering the use of that in humans, no?

16                  A.    The F.D.A. has been given an  
17                  application by a company that wants to study it in humans.

18                  Q.    They want to study it for Alzheimer's,  
19                  right?

20                  MS. BURNES: Objection.

21                  THE COURT: Not seeing the relevance, Mr.  
22                  Gamburg.

23                  MR. GAMBURG: He just -- I could address at  
24                  sidebar, I could address it right now.

25                  THE COURT: We'll take a break brief

1 sidebar.

2 (Sidebar)

3 THE COURT: Got the noise.

4 MR. GAMBURG: Uh-huh, it sounds like a  
5 (unintelligible).

6 THE COURT: (unintelligible).

7 MS. BURNES: Okay.

8 MR. GAMBURG: Judge, because the Government  
9 got into the toxicity (unintelligible) it was approved, he  
10 says it wasn't approved but it's in the chain of command,  
11 so if there's (unintelligible) this company will do this  
12 the whole time and -- and Merlino concerns.

13 THE COURT: Well, let's get back to legal  
14 relevance, all right?

15 MR. GAMBURG: Yes, sir.

16 THE COURT: At the present time and  
17 certainly at the time when the defendant was distributing  
18 it, it was not approved.

19 MR. GAMBURG: Okay.

20 THE COURT: And -- and that is the  
21 statutory violation charge here. And the fact that there  
22 might, at some point, be an approval based upon a rigorous  
23 scientific process does not alter whether or not Mr.  
24 Merlino had violated the statute during the time period  
25 requested.



1 MR. GAMBURG: Okay.

2 THE COURT: With -- with respect to the  
3 reference of toxicity simply to put in perspective what  
4 the concerns are and so I will sustain the objection.

5 MS. BURNES: Thank you.

6 MR. GAMBURG: Thank you, Your Honor.

7 MS. BURNES: And for the record, Your  
8 Honor, it's so that we don't find ourselves to, been at  
9 sidebar which the -- the -- the article to which you  
10 describe is so -- so early in the process --

11 MR. GAMBURG: Just -- just --.

12 MS. BURNES: -- that the F.D.A. cannot make  
13 --

14 MR. GAMBURG: Just -- just let Ms. Burnes  
15 stop (unintelligible) before I stop her --

16 MS. BURNES: Okay -- okay.

17 MR. GAMBURG: -- that's all I have.

18 THE COURT: Understood.

19 MR. GAMBURG: Thank you, Your Honor.

20 (Sidebar concluded)

21 THE COURT: I sustain the objection on  
22 grounds of relevance, ladies and gentlemen.

23 MR. GAMBURG: Thank you, Your Honor, with  
24 that, I have no further questions.

25 THE COURT: All right, Mr. Gamburg. Any

1 re-direct?

2 MS. BURNES: No, Your Honor.

3 THE COURT: All right, you may step down,  
4 Doctor, thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: Ms. Burnes, would now be a  
7 convenient time for us to break for lunch?

8 MS. BURNES: Yes, Your Honor.

9 THE COURT: All right, I have no idea  
10 whether lunch is here, but nonetheless, since I have an  
11 idea where our schedule is, it's just occurred to me that  
12 this would be a good breaking point. And so with that,  
13 once again as if by magic Mr. Henry appears and we'll  
14 (unintelligible) back.

15 THE MONITOR: All rise.

16 (JURY EXITS)

17 THE COURT: All right, Counsel, let's just  
18 be seated for a minute to get our bearings. Government, I  
19 believe you have moved already contemporaneously the  
20 exhibits that you wish into evidence, is that correct?

21 MS. BURNES: Your Honor, I did my best.

22 THE COURT: All right, over the lunch break  
23 why don't you just check your notes and confer with Mr.  
24 Gamburg so we have sort of an agreement as to what is the  
25 record of the case, all right?

1 MS. BURNES: Yes, Your Honor. I do know --  
2 I do have final short testimony --

3 THE COURT: Right.

4 MS. BURNES: -- by special agent --

5 THE COURT: Right.

6 MS. BURNES: -- Arcari.

7 THE COURT: Yeah. I -- I -- and I'll be  
8 candid, I -- I forget that but I don't think that will  
9 inhibit so I thought it was still a good sense at the  
10 moment of where we stand just logistically, all right. So  
11 confer about the exhibits.

12 MS. BURNES: Yes.

13 THE COURT: I previously said for reasons  
14 that we discussed earlier in terms of sequence that I  
15 would let you recall special agent within limited  
16 parameters and we'll proceed to do that. And then I'll --  
17 I'll turn to Mr. Gamburg. When the Government rest, Mr.  
18 Gamburg --

19 MR. GAMBURG: Judge --

20 THE COURT: -- my -- I'll just get a sense  
21 from you of your plans going forward.

22 MR. GAMBURG: Right. First Judge, I did  
23 mark as D One, I did not intend to move that.

24 THE COURT: It's fine.

25 MR. GAMBURG: Just in case there was any

1 issue with that. Judge, I don't think my position -- I do  
2 not have any witnesses, I've discussed the potential  
3 character witnesses with Dr. Merlino, but I made strategic  
4 decision not to call them.

5 THE COURT: Right, I'll note. Yeah, you --  
6 you've already experienced -- you've already very  
7 experienced lawyer, Mr. Gamburg --

8 MR. GAMBURG: Correct.

9 THE COURT: -- and you know the pros and  
10 cons --

11 MR. GAMBURG: Correct.

12 THE COURT: -- of such witnesses.

13 MR. GAMBURG: Correct.

14 THE COURT: And so I -- I -- and I'm sure  
15 you have conferred with your client about that.

16 MR. GAMBURG: And -- and finally, Your  
17 Honor, Dr. Merlino does not intend on testifying so I  
18 intend on resting right after the Government. I do, as I  
19 told Your Honor this morning, I don't know if Dr. Merlino  
20 was present or not, but I do have a Rule 49 though --.

21 THE COURT: Understood.

22 MR. GAMBURG: I do have a case which I'll  
23 share with the Court as well as counsel at the time that  
24 we get to that.

25 THE COURT: All right. Well, did you want

1 to -- want to give me the citation in advance just so I  
2 can have an informed view of the precedent.

3 MR. GAMBURG: Yes, Your Honor, it's not 3rd  
4 Circuit case, it's United States versus Gas Pipe,  
5 Incorporated 997 F.3d 231 specifically Your Honor, I tried  
6 to find the page number within the case. But it deals  
7 with for all of the Government and specifically, Your  
8 Honor, it deals with -- court's indulgence.

9 THE COURT: Whatever (unintelligible), Mr.  
10 Gamburg.

11 MR. GAMBURG: Section titled 18 USC Section  
12 371 which was not charged in this indictment.

13 THE COURT: All right but you -- you feel  
14 that there may be discussion there that -- that sheds  
15 light on the charges here.

16 MR. GAMBURG: No, Your Honor, it -- it --  
17 it goes to fraud on the F.D.A. which is what the  
18 Government opened the door, they didn't charge fraud on  
19 the F.D.A., they charged misbranding and it deals with the  
20 ultimate end user is my position.

21 THE COURT: I -- I -- yes, I -- I  
22 understand.

23 MR. GAMBURG: But --

24 THE COURT: Yeah.

25 MR. GAMBURG: -- but the case has the exact

1 specific language, not for human consumption.

2 THE COURT: Right.

3 MR. GAMBURG: Which is why either myself  
4 and my office pulled it and on the other case which I  
5 intend to rely on it (unintelligible) by analogy is a 3rd  
6 Circuit case and that's United States versus Goldberg 538  
7 F.3d 280.

8 THE COURT: 538 F.3d 280, okay.

9 MR. GAMBURG: Yes, sir.

10 THE COURT: Okay, great.

11 MR. GAMBURG: Thank you, Your Honor.

12 THE COURT: All right, yeah, I'll -- I'll  
13 try to do my homework just so I'm in a position to -- to  
14 understand the argument, Mr. Gamburg.

15 MR. GAMBURG: But getting back to the  
16 Courts, I think, original question we don't  
17 (unintelligible) evidence for the defendant.

18 THE COURT: Right. And -- and -- and  
19 again, it's not my practice to inquire into the  
20 discussions between counsel and the client, you're a very  
21 experienced lawyer and I'm sure you've had a thorough  
22 discussion with Dr. Merlino.

23 MR. GAMBURG: Thank you.

24 THE COURT: And I say that in Dr. Merlino's  
25 presence here on the record in open court. So with that,

1 we'll take a lunch break, come back and let me -- let me  
2 check with Mr. Henry whether the lunch for the jury had  
3 arrived.

4 MS. BURNES: Okay.

5 THE COURT: Did lunch arrive Chris, I  
6 thought it might have.

7 MR. CHRIS: Yeah, just in time actually.

8 THE COURT: All right, so I didn't screw up  
9 our schedule, great.

10 MR. GAMBURG: One o'clock, Your Honor?

11 THE COURT: Yeah, one o'clock, and then  
12 we'll do that then I -- I think we'll proceed right to  
13 closings after the -- after you rest. Why don't we do  
14 this, Mr. Gamburg, for flow purposes. Rather than break  
15 again, right after the agent testifies, why don't we do  
16 closings and then we'll take up your motions.

17 MR. GAMBURG: Sure.

18 THE COURT: And this is again, the  
19 government -- you would agree there is no waiver in that  
20 and it's without prejudice to my power to grant a motion  
21 even after closings.

22 MS. BURNES: Yes, Your Honor.

23 THE COURT: All right. So the record's  
24 protected but I think that way we take a break right after  
25 closings and then -- well then I (unintelligible) proceed

1 the charge (unintelligible) if I created the motion so  
2 again --

3 MR. GAMBURG: Yes.

4 THE COURT: -- we -- we would still be at a  
5 point in the proceedings which makes sense, that's all I'm  
6 looking for, so, right?

7 MS. BURNES: Yes, Your Honor.

8 MR. GAMBURG: One other logistical question  
9 for Chris, is the Courtroom going to be open maybe at  
10 twelve thirty or --

11 THE COURT: We -- we --

12 MR. GAMBURG: -- so we can get in here.

13 THE COURT: We can make that happen and  
14 even if -- if it's not you can ring the bell, we'll let  
15 you in.

16 MR. GAMBURG: Okay.

17 MR. CHRIS: Yeah, that's fine.

18 MR. GAMBURG: Thanks.

19 THE COURT: One way or the other, we'll get  
20 you in.

21 MR. GAMBURG: Thank you, Your Honor.

22 THE COURT: Sure. All right. And thanks  
23 to our marshals for their service.

24 MR. CHRIS: No problem, Your Honor.

25 (Off the record; 12:02:39 to 13:03:51)



1 (Off the record conversations)

2 (Off the record; 13:04:20 to 13:06:38)

3 THE COURT: All right. We'll get back to  
4 work. Ms. Burnes, do you have any more witnesses?

5 MS. BURNES: Yes, Your Honor, the  
6 government recalls Special Agent Bryan Arcari for a  
7 limited purpose.

8 THE COURT: All right, thank you. Members  
9 of the Jury, it's within the discretion of the judge to  
10 let a party recall witnesses. At an earlier stage in the  
11 case I discussed with both counsel that some evidence  
12 should come in before we heard certain testimony from the  
13 special agent. So without objection from the defense,  
14 we're recalling him at this stage, okay. And with that,  
15 you may proceed.

16 MS. BURNES: Thank you, Your Honor.  
17 Special Agent Arcari --.

18 THE COURT: And you're still -- you're  
19 still under oath sir, as you --.

20 THE WITNESS: I understand. I understand,  
21 Your Honor.

22 MS. BURNES: Mr. Conroy, can -- can we  
23 bring up Government's Exhibit One seventy-one page two  
24 which is already in evidence.

25 BRYAN ARCARI; Previously sworn

1 REDIRECT EXAMINATION

2 BY MS. BURNES:

3 Q. Special Agent Arcari, during the  
4 course of your investigation, did you -- did you request a  
5 subpoena for records for the cell phone number depicted on  
6 page two of Government's One seventy-one?

7 A. Yes, I did.

8 Q. And that's the number ending in eight  
9 zero zero two?

10 A. That's correct.

11 Q. And directing your attention to  
12 Government's Exhibit One ninety-one. Are these the  
13 records received in response to a subpoena for the  
14 subscriber information for that phone number ending in  
15 eight zero zero two?

16 A. Yes, they are.

17 MS. BURNES: Your Honor, the government  
18 moves Government's Exhibit One ninety-one into evidence.

19 MR. GAMBURG: No objection.

20 THE COURT: Admitted.

21 MS. BURNES: That can be published to the  
22 Jury please.

23 BY MS. BURNES: (Cont'g.)

24 Q. And directing your attention to the  
25 top of the page; the left-hand side, the account details.

1 Who is the account holder for the phone number ending in  
2 eight zero zero two?

3 A. William A. Merlino.

4 Q. And what's the address?

5 A. 4612 Somers Point, Mays Landing, New  
6 Jersey 08330.

7 MS. BURNES: Okay, thanks. You can take  
8 that down, Mr. Conroy.

9 BY MS. BURNES: (Cont'g.)

10 Q. And directing your attention back to  
11 Government's Exhibit One seventy-one page three. During  
12 the course of your investigation, having -- having  
13 received this -- this document, did you subpoena Shore  
14 Medical Center for documents associated with the M.R.N.  
15 number listed on page three of Government's One seventy-  
16 one?

17 A. Yes, I did.

18 Q. And directing your attention to  
19 Government's One eighty-five. Are these the records  
20 received from Shore Medical Center for the -- for the  
21 medical record number that you just identified?

22 A. Yes, they are.

23 MR. BURNES: Your Honor, the Government  
24 moves admission of Government's Exhibit One eight five?

25 MR. GAMBURG: No objection, Your Honor.

1 THE COURT: Admitted.

2 BY MS. BURNES: (Cont'g.)

3 Q. Now, if we can take a look at  
4 Government's Exhibit One seventy-one, page three and  
5 Government's Exhibit One eighty-five, page nine. Special  
6 Agent Arcari, the left-hand side of your screen is the  
7 Shore Medical Center document that has the patient name  
8 William Merlino on it. Is that right?

9 A. That's correct.

10 Q. Okay. And on the right-hand side that  
11 -- are those copies of the Shore Medical Center records  
12 that were subpoenaed in this case?

13 A. Yes, they are.

14 Q. And the patient name is redacted. But  
15 for the record, is it a patient going by M.N. that -- in  
16 records that were provided to the -- to the defense  
17 regarding that?

18 A. Yes, that's correct.

19 Q. And directing your attention then to  
20 the -- the top section. What is the M.R.N. number, the  
21 medical record number on the legitimate documents on the  
22 right-hand side of the page?

23 A. Six zero seven eight three six four.

24 Q. And on the left-hand side, what is the  
25 medical record -- medical record number?

1 A. Six zero seven eight three six four.

2 Q. Now, directing your attention to the -  
3 - to the right-hand side in the legitimate record, what is  
4 the age depicted of the patient?

5 A. Fifty-seven years old.

6 Q. And what is the gender of the patient?

7 A. Female.

8 Q. And directing your attention to the  
9 left-hand side of the page, what is the age of the Merlino  
10 document?

11 A. Eighty-four years.

12 Q. And what's the gender of the patient?

13 A. Male.

14 Q. And finally, on the -- on the right-  
15 hand side of the page, what is the discharge date?

16 A. June 4th, 2021.

17 Q. And on the Merlino document, what is  
18 the discharge date?

19 A. August 5th, 2021.

20 Q. Now, directing your attention to the  
21 middle of page nine. Well, we can -- we can start at the  
22 top with the -- with the discharge diagnosis. On the  
23 right-hand page, the legitimate record from Shore Medical  
24 Center, is there a strikethrough on - on line one?

25 A. There is not.

1 Q. Okay. On the -- that nine items, one  
2 through nine on the discharge diagnosis, do they appear on  
3 the left-hand page, of the Merlino documents?

4 A. They are similar.

5 Q. Okay. And as to H -- H.P.I. in  
6 hospital codes. On the legitimate medical record, what is  
7 -- what is the full sentence of -- of the hospital  
8 (unintelligible) say?

9 A. She is a very pleasant fifty-six year  
10 old Caucasian female with a significant past medical  
11 history of basal cell carcinoma and depression, who was  
12 admitted to Shore Medical Center for pancreatic mass.

13 Q. And what's the next sentence?

14 A. She was in her usual state of health  
15 until approximately -- approximately three weeks ago when  
16 she developed upper abdominal pain, which has persisted.

17 Q. Now, Special Agent Arcari this -- this  
18 says the patient is a fifty-six year old, Caucasian  
19 female. Whereas at the top of the page, there's an  
20 indication of fifty-seven years. When -- when is the  
21 narrative in the middle of the page that you just read?  
22 Is that from last summer?

23 A. That's correct.

24 Q. And when were the records retrieved in  
25 this investigation?

1 A. This summer.

2 Q. This year?

3 A. Yes.

4 Q. Okay. And if you can just continue,  
5 what's the -- the third sentence in the H.P.I. at hospital  
6 codes on that legitimate medical record?

7 A. She was admitted to the hospital for  
8 further evaluation and treatment.

9 Q. And if you could just move down to the  
10 -- the last sentence of that paragraph. She will require  
11 --.

12 A. She will require tissue diagnosis for  
13 confirmation.

14 Q. Okay. So let's take a look at the  
15 left-hand document, the Merlino document, the H.P.I. at  
16 hospital codes. And what does the full sentence there,  
17 read?

18 A. He is a very pleasant fifty-six-year-  
19 old Caucasian male with a significant past medical history  
20 of basal cell carcinoma and depression, who was admitted  
21 to Shore Medical Center for pancreatic mass.

22 Q. What's the next sentence?

23 A. He was in his usual state of health  
24 until approximately three weeks ago, when she developed  
25 upper abdominal pain, which has persisted.

1 Q. And let's take a look just at that --  
2 that last sentence of that paragraph.

3 A. He will require tissue diagnosis for  
4 confirmation.

5 Q. And finally, Special Agent Arcari, on  
6 the left-hand side with the Merlino document, the primary-  
7 care provider and consulting provider what's -- what's  
8 listed as the primary-care physician?

9 A. M. McMurray, M.D.

10 Q. And taking a look at the Shore Medical  
11 Center website on the right-hand side, what is listed as  
12 the primary-care physician?

13 A. Ann McMurray A.P.N.

14 MS. BURNES: Thank you Judge no further  
15 questions.

16 THE COURT: Any questions?

17 MR. GAMBURG: No questions, Your Honor.

18 THE COURT: All right, you may step down.

19 THE WITNESS: Thanks.

20 THE COURT: Ms. Burnes, are there any other  
21 witnesses that the government wishes to present?

22 MS. BURNES: No, Your Honor.

23 THE COURT: All right. And over the lunch  
24 break, did you get the opportunity to review the various  
25 Exhibits and make sure everything has been moved for



1 admission that needs to be?

2 MS. BURNES: Yes, Your Honor.

3 THE COURT: And are there any outstanding  
4 objections, Mr. Gamburg on any Exhibits?

5 MR. GAMBURG: No, Your Honor.

6 THE COURT: All right. Anything further,  
7 Ms. Burnes?

8 MS. BURNES: No, Your Honor, the government  
9 rests.

10 THE COURT: All right. Members of the Jury  
11 I'm sure you may recall in my introductory instructions, I  
12 said that a defendant in a criminal case never has any  
13 obligation to present evidence to present witnesses or to  
14 testify. So now, I'll turn to Mr. Gamburg. Mr. Gamburg,  
15 do you choose to present any witnesses or other evidence?

16 MR. GAMBURG: No, Your Honor, on behalf of  
17 the defendant we respectfully rest.

18 THE COURT: All right. So ladies and  
19 gentlemen of the Jury, that completes the factual record  
20 in the case, all right. And we're now at the point where  
21 you'll get to hear closing argument from the attorneys.  
22 After that we'll take a short break and then I will give  
23 you instruction on the law.

24 As I said at the outset, argument is  
25 important because it gives you a perspective on the

1 evidence that you've heard and it gives you the views of  
2 the parties to the action. But is -- it is, as I said at  
3 the outset, not the evidence. The evidence is what you  
4 saw, what you recall, what you heard, this is the  
5 attorneys' interpretations of that evidence.

6 And with that, I ask you to give attention  
7 to both sides. Ms. Burnes.

8 CLOSING ARGUMENT

9 MS. BURNES: Thank you, Your Honor. Mr.  
10 Conroy, Exhibit One. If we could zoom in. Good  
11 afternoon. This is simple case. This is a case about a  
12 man who disagreed with the law, who decided he wasn't  
13 going to follow the law. This is a case about a man who  
14 sold a dangerous chemical over the internet as a weight-  
15 loss drug.

16 And this is a case about a man who lied  
17 about those drugs, who hid his intent from the regulatory  
18 authorities, the F.D.A., the Customs and Border Patrol,  
19 the government agencies intended to keep us safe. The  
20 tweet posted January 3rd, 2018 reads, D.N.P. available on  
21 eBay for weight loss is not legal in U.S. so listed as  
22 fertilizer on eBay, hashtag diet, hashtag weight loss.

23 That's the scam intended to defraud and  
24 mislead. That's the intent for the drug to be for human  
25 consumption, for the business of selling D.N.P. to

1 customers. And by labelling it both on the package and on  
2 his website, as something else.

3 Now, on behalf of the United States and  
4 opposing this case, I too want to thank you for your time  
5 and attention that you've spent over the past few days.  
6 And although it's a relatively short case, it's an  
7 important one. It's a criminal case, it's important to  
8 all of the parties. And it's also a criminal case, which  
9 is important to our system of justice.

10 In your deliberations, you'll be  
11 considering (unintelligible) count and you'll have to  
12 recall the testimony and evidence in this case. So if my  
13 argument inadvertently misstate a fact, it's your  
14 recollection controls because you're the Jury. You find  
15 the facts. That's true if Mr. Gamburg misstates the fact,  
16 that's true even if His Honor misstates the fact because  
17 you're the Jury, your recollection controls, you find the  
18 facts.

19 And the most powerful tool in your toolbox  
20 as a jury that the twelve of you bring here to this room  
21 is your commonsense. With your commonsense, you'll see  
22 that the defendant introduced mislabeled drugs into  
23 interstate commerce. Now, you'll hear from His Honor the  
24 Court on the law. And the law is that the government must  
25 prove each element of this case beyond a reasonable doubt.

1                   That's our burden. And we accept that  
2                   burden, we welcome that burden, that is the law. And as  
3                   you evaluate the evidence in this case, you'll see that  
4                   we've met our burden with each element. The judge will  
5                   instruct you on proof beyond a reasonable doubt. And if I  
6                   state anything different about the law, follow His Honor's  
7                   instructions. But proof beyond a reasonable doubt means  
8                   prove beyond -- it does not mean proof beyond all possible  
9                   doubt.

10                   It does not mean to a mathematical  
11                   certainty. Possible doubts or doubts based on conjecture,  
12                   speculation or hunch are not reasonable doubts. It's not  
13                   (unintelligible), it's not speculation and it's not  
14                   sympathy. There is no doubt in this case that the  
15                   defendant caused the introduction of a drug into  
16                   interstate commerce. That's the third element that you're  
17                   going to be instructed in the law.

18                   And that's because you heard the testimony  
19                   on this. And the testimony is fairly uncontroverted, the  
20                   defendant went into the Mays Landing post office virtually  
21                   every day during the course of his business. And handed  
22                   over parcels to be shipped out. And you saw the records  
23                   from Inspector Piasecki with the -- with the two Click-N-  
24                   Ship accounts used in the mailing of all of those parcels.  
25                   They were parcels that went from New Jersey, parcels that

1           went to the Eastern District of Pennsylvania, in the case  
2           of the purchases, that you heard testimony about.

3                       Parcels that went all over the country and  
4           around the world. But the shipping of the drugs from New  
5           Jersey into the Eastern District of Pennsylvania,  
6           satisfies the interstate commerce the one in this case.  
7           And you'll also get an instruction about venue, then you  
8           think that some part of the crime occurred here in the  
9           Eastern District of Pennsylvania, the same evidence,  
10          Springfield, Pennsylvania, as Special Agent Arcari,  
11          testified, is here in the Eastern District of  
12          Pennsylvania.

13                      There's no doubt. And in discussing, in  
14          reviewing the evidence in this case, you'll review all of  
15          the evidence, you'll review the tweet from January 3rd of  
16          2018 where the defendant admits that D.N.P. available on  
17          eBay for weight loss is not legal in the U.S. so listed as  
18          fertilize on eBay. And if we take a look at Government's  
19          Two, a month later, at the top of the page SimCare, has  
20          offered for sale forty D.N.P. crystalline capsules for  
21          agricultural use, hundred and twenty-five milligrams each.  
22          And this is from February 3rd of 2018.

23                      The defendant did exactly what he tweeted  
24          about posting for sale on eBay D.N.P. for diet, for weight  
25          loss, for human use. He put pictures of capsules on his

1 sales. He described them as capsules. And you're  
2 entitled to consider all of that. You're entitled to  
3 consider all of that as to whether or not this is a drug.  
4 Because a drug is simply something that's intended to  
5 affect the body of man affect a person.

6 But it's an old statute, (unintelligible)  
7 body of man at some point this afternoon, I expect. Now,  
8 this is in February of 2018. You've seen the eBay  
9 records. You've seen summaries of the PayPal records.  
10 You've seen summaries of Click-N-Ship records. This  
11 conduct started in November of 2017. And that's the date.  
12 That's the first date and (unintelligible) charged in the  
13 indictment.

14 In November of 2017, this defendant started  
15 his business. Shipping D.N.P. in interstate commerce that  
16 was misbranded. Shipping D.N.P. intended for human use.  
17 And as we take a look at government's Exhibit Nine, page  
18 three; SimCare, which is the defendant's eBay identifier,  
19 SimCare had D.N.P. transactions from November of 2017  
20 through August of 2018.

21 That's three hundred and seventy-four total  
22 sales. Because this was a business. These were paying  
23 customers who wanted this D.N.P. And a seller who wanted  
24 to sell the D.N.P. encapsulated as a diet drug for human  
25 consumption. But he knew -- he told you this tweet, he

1       knew it was illegal. So he had to call it something else  
2       to hide his business.

3                       Now, in August of 2018, you've heard  
4       evidence about several things happening. One of those  
5       things is that Special Agent Bryan Arcari, made an  
6       undercover purchase of D.N.P. And in fact, it was one of  
7       the last transactions that was available on -- on eBay.  
8       So if we take a look at Government's Twenty-nine. And in  
9       fact, we can take a look at Government's Twenty-seven.  
10      You heard the testimony, you saw the evidence. After  
11      contacting -- after ordering from eBay, responding to an  
12      ad for D.N.P., the special agent was directly contacted by  
13      email by SimCare asking if he wanted to have the product  
14      encapsulated.

15                     If he wanted to pay extra to have it  
16      encapsulated and the agent agreed and paid the extra fee.  
17      That encapsulation is an important piece of evidence in  
18      this case. And that's because the first element that  
19      you'll hear the Court instruct you on for a misbranding  
20      case is the fact that 2,4-Dinitrophenol is a drug.

21                     And a drug simply means intended for human  
22      use. And if something is intended for use as Dr. Simone  
23      told you in the diagnosis, cure, mitigation, treatment or  
24      prevention of disease or intended to affect the structure  
25      of any function of the body.

1           You get to look at all of the statements,  
2           all of the claims, all of the information that Merlino  
3           provides. As long as it comes from the seller that's  
4           something that you get to use your commonsense. And your  
5           commonsense tells you you've seen the tweets. He intended  
6           for human use. You've seen the hashtag; diet, weight loss  
7           -- weight loss. You see the picture it's distributed in  
8           capsules for humans to consume.

9           Let's look at Exhibit Fifty-one, this is  
10          another purchase of D.N.P. It's distributed in capsules.  
11          And let's take a look at Exhibit Sixty-six, Merlino sold  
12          the D.N.P. and distributed it in capsules. All of these  
13          things go to intended use. All of these things tell you  
14          with your commonsense that D.N.P. is a drug in this case.

15          There is no doubt as to the first element  
16          of this. And if you had any questions at all, you can  
17          look at the emails with one email trusted customer.  
18          Because after he tweeted about it in January, after he put  
19          it on for sale in February, he emailed with Jack Knapman.  
20          Let's look at Twelve A. In March and this is the email  
21          that begins in the middle of the page Tuesday, 13th March,  
22          below that. That's the response.

23          But well -- on the second page Merlino says  
24          in the past, when this was a legal diet medication in the  
25          U.S. and over-the-counter, he's talking about the dosing.



1 He's talking about intended human use. This is a drug.  
2 And as we go back to the first page, Mr. Conroy the top of  
3 the page, his customer is intending it for human  
4 consumption too.

5 I have a question when D.N.P. was used for  
6 human consumption, he put it in the past. But the  
7 customer -- he knew his customers were going to consume  
8 this as a drug. There is no doubt that D.N.P. was a drug.  
9 And that's the first element that you have to evaluate.

10 Now, the second element is that the D.N.P.  
11 -- I should say the next element is interstate commerce.  
12 We've discussed that.

13 But the next element is that this D.N.P.  
14 drug was misbranded. And there is no doubt in this case  
15 that it is misbranded. Here's where you use your  
16 commonsense. Here's where you evaluate all of the  
17 evidence. And here's where you get to look at the  
18 contradictory statements that Merlino makes during the  
19 course of his fraud.

20 That's -- that's the evidence of the crime.  
21 That's the evidence to mislead and (unintelligible) the  
22 F.D.A., as we'll talk about, but it's also the evidence of  
23 misbranding in this case. And that's because, let's take  
24 a look at Fifty-two, when the defendant ships a package  
25 with a label, saying not for human consumption, that's

1 false. That's misleading in any particular.

2 Why is it false? Because this label wasn't  
3 intended for the consumer, he knows that his customers are  
4 buying the drug for human use. You see the emails, you  
5 see the correspondence, the whole purpose of his business  
6 was for human consumption. Not for human consumption  
7 makes this label misbranded.

8 But that's not all. Let's take a look at  
9 Government's Forty-five. And at the top of the page  
10 Government's Forty-five is one of the (unintelligible) you  
11 saw on the defendant's website for Agro Fortis Supply.  
12 And the advertisement here is 'welcome to Agro Fortis  
13 Supply, leading supplier of D.N.P. fertilizers.' You  
14 heard from Dr. Simone, you heard from Special Agent Arcari  
15 as to why he gathered this evidence.

16 A website in this case is labelling. A  
17 website is part of the information that comes directly  
18 from the seller Merlino to his customer. And by calling  
19 his D.N.P. fertilizer on the website when he intended  
20 these drugs for human use, that's the misbranding. That's  
21 the crime.

22 Human consumption was the whole point of  
23 defendant's business. Customers followed him from eBay to  
24 Agro Fortis Supply to simcare@gmail.com. He sent blast  
25 emails to his customers to increase sales. He sent emails

1 to customers in Canada and Romania and customers in the  
2 U.S.

3 In fact, you saw several emails with a  
4 particular customer, David Freek in Canada, who identified  
5 himself as a distance runner. He was a loyal customer.  
6 And when Merlino was talking to his loyal -- loyal  
7 customer who wanted this D.N.P. for human consumption, who  
8 wanted to distribute it to others who wanted it for human  
9 consumption that's where you see the intended use of the  
10 drug, that's where you see the misbranding.

11 That's where they discussed that it's going  
12 to be called something else to hide the business, to hide  
13 the sin. That's where they discussed using yellow pigment  
14 number twelve to get through customs for foreign  
15 countries. The whole point of this business is human  
16 consumption.

17 And when Merlino put fertilizer on his  
18 website or when he put not for human consumption on his  
19 label, that's the misbranding. And there is no doubt as  
20 to the fourth element, the intent to defraud or mislead.  
21 Because the intent to defraud or mislead here is not the  
22 customer.

23 The intent to defraud or mislead is the  
24 F.D.A. and C.D.P. It's the regulators. And you get to  
25 look at the entire course of conduct and the entire course

1 of evidence. In November of 2017 the defendant used a  
2 Click-N-Ship account in the name of his former employee,  
3 Nancy O'Brian.

4 But he also had SimCare and he had his  
5 office address and used that Click-N-Ship account without  
6 asking permission to use her name to ship his daily  
7 packages from Mays Landing and around the world and around  
8 the country. And most importantly, into the Eastern  
9 District of Pennsylvania.

10 And he intended this D.N.P. to be used for  
11 human consumption. You saw that evidence. And he had  
12 eBay transaction after eBay transaction November,  
13 December, January, February, you saw not just the Click-N-  
14 Ship mailing and not just the eBay transactions but the  
15 PayPal transactions.

16 We can take a look at Government's Ten, the  
17 PayPal transactions. On the fourth page, shows you by  
18 month that he did dozens of transactions. On any given  
19 month in November of 2017, twelve D.N.P. PayPal  
20 transactions for six hundred and seventy-five dollars. By  
21 January of 2018 it was seventy-seven D.N.P. PayPal  
22 transactions five thousand seven hundred and eighteen  
23 dollars that month.

24 In February forty-four transactions, in  
25 March

1           fifty-seven transactions and in July there  
2           are zero transactions. Now we don't know what happened in  
3           July, other than he received a letter from Customs and  
4           Border Patrol telling him it was illegal to importt D.N.P.  
5           into the United States. We know that a bulk shipment of  
6           D.N.P. was seized in May from -- from Memphis.

7           And you saw from the search -- search that  
8           this is somebody who maintained bulk D.N.P. in his home.  
9           And then in August there are thirteen PayPal transactions  
10          and they drop off in September because that's when eBay  
11          removed D.N.P. from its website.

12          By October of 2018, there are fourteen  
13          transactions and by November of 2018, there are fifty-one  
14          transactions. These records take us all the way up to  
15          January of 2019. We know that in fact, there were  
16          transactions after that because the special agent did a  
17          transaction on January 31st that resulted a shipment on  
18          February 1st.

19          You can consider the volume and the  
20          regularity in considering the defendant's intent, this was  
21          not a mistake. This was not an accident. This was the  
22          business. This was the plan.

23          And in considering the intent to defraud  
24          and mislead that's when you take a look, among other  
25          things that the eBay records to see Government's Ten --

1 I'm sorry, Nine. That the sales on page three, four Mr.  
2 Conroy, five sale after sale after sale, listed as D.N.P.  
3 for agricultural use.

4 That's not for the customer, that's for the  
5 regulators. That's for customs. The evidence in this  
6 case consists of the physical evidence and the photos that  
7 you've seen of it, of these transactions of these  
8 undercover buys. And you're able to evaluate this label,  
9 not for human consumption.

10 The intent to defraud and mislead is not  
11 the customer, the customer knew what they were getting.  
12 The customer knew what they were buying. It's to hide the  
13 business, hide the true purpose of this sale.

14 Government's Exhibit Sixty-five which is  
15 the third U.C. buy. This is the package with the yellow  
16 tinted label that Special Agent Arcari recovered at the  
17 post office, after Inspector Piasecki watched him drop off  
18 packages that day. This is the package that was received  
19 in Springfield, Pennsylvania.

20 This package doesn't contain a sticker at  
21 all. It doesn't contain a label at all. That's  
22 additional evidence for you to consider. The package was  
23 ordered off of the Agro Fortis Supply site. The package  
24 was ordered as fertilizer.

25 The information on the packages, which as

1       you heard from Dr. Simone, it's very important information  
2       to the F.D.A. That legitimate drugs, approved drugs, have  
3       information right on the container, the label and there  
4       are all -- and there are safety and efficacy reasons for  
5       that. Merlino didn't do that.

6               Merlino conducted his business, shipping  
7       D.N.P. encapsulated for human use month after month after  
8       month. The records in evidence in this case and the  
9       indictment -- indictment charges up to March of 2019. And  
10      that's because at that time as you heard the testimony,  
11      Special Agent Arcari and other members of law enforcement  
12      conducted a search warrant on the defendant's business.

13             And you saw pictures of that lab. You saw  
14      pictures of the yellow tinted wall. You saw pictures and  
15      you have evidence of the capsules, of the reds, of the  
16      whites, of the greens, and of the pill press. All  
17      evidence that was seized to support his business selling  
18      D.N.P. to willing customers over the internet.

19             But you also heard additional evidence  
20      today, you heard evidence that after Merlino was indicted.  
21      And after -- and when he's charged in this case, was set  
22      for trial after a pandemic delay. The defendant created  
23      and fabricated false medical records. He faked pancreatic  
24      cancer.

25             He told his attorney he had pancreatic

1 cancer. And when asked for documentation of that  
2 pancreatic cancer, he fabricated a letter from a  
3 legitimate doctor. And he fabricated a discharge document  
4 from a legitimate patient.

5 And his Honor will instruct you that  
6 Merlino is not charged with a crime associated with that  
7 activity here today. That evidence is something you can  
8 consider as consciousness of guilt. You get to consider  
9 who does that? Who, when faced with a court date, faced  
10 with an opportunity to submit to his lawyer  
11 (unintelligible).

12 Who fabricates records and sends them to  
13 his lawyer knowing they're going to be submitted to the  
14 Court and to the government. You can consider that  
15 evidence in whether the defendant is guilty of  
16 introduction of misbranded drugs into interstate commerce.

17 Because you're the Jury, you get to  
18 evaluate those facts and follow the law as advised by the  
19 judge. Now there was a lot of discussion in this case  
20 that somehow the label not for human consumption was true.

21 And therefore, the case can't be a  
22 misbranding case. It was questions along those lines.  
23 And so listen to the Judge's instruction, about labelling,  
24 about intention to defraud, about intended use. Intended  
25 use is one of the keys here. Because there's plenty of



1 products available on the internet or in a store that are  
2 not for human consumption.

3 You could go out today and buy a gallon of  
4 bleach. And that's not conduct that will trigger any sort  
5 of review by the F.D.A. If you're using the bleach to  
6 clean your house. But if you sell the bleach, if you sell  
7 the bleach in a capsule, if you sell it in an eyedropper,  
8 if you sell it for the purpose of assisting macular  
9 degeneration. If you say -- if the seller on his website  
10 says put your glasses down and use my bleach.

11 That perfectly legitimate product becomes a  
12 drug because it's about intended use. The seller is  
13 intended that it be in affect the body of man or to  
14 diagnose or cure or mitigate a disease. And that's  
15 (unintelligible). That's what the evidence shows in this  
16 case, that the D.N.P., while a perfectly legitimate  
17 product, which has chemical, industrial chemical  
18 properties. When it's advertised as a diet drug, when  
19 it's advertised for weight loss, when it's advertised in  
20 capsules, when there are discussions about dosing, how  
21 often, how much, how many. That's a drug intended for  
22 human consumption, that's the business. And then you  
23 label it that says otherwise is misbranding.

24 This is a simple case. This is a case  
25 about a scam, about a man who sold this dangerous chemical

1 over -- as a weight-loss drug. He sold it to willing  
2 customers. He called it fertilizer, he called it  
3 agricultural use. And all that as a cover-up so he  
4 wouldn't get caught selling his drugs for human use. And  
5 based upon all of this evidence, there's no doubt that  
6 William Merlino is guilty.

7 THE COURT: All right Mr. Gamburg.

8 CLOSING ARGUMENT

9 MR. GAMBURG: Thank you, Your Honor. May  
10 it please the Court, Counsel. Good afternoon, ladies and  
11 gentlemen. The F.D.A. ought to go to every supermarket  
12 every 7-Eleven, every Wawa and take all those  
13 (unintelligible) all those canisters and get them off the  
14 shelf. Because I'm not saying (unintelligible).

15 But certainly when I was in high school, I  
16 saw a lot of kids that couldn't wait to go to that shop.  
17 And they weren't trying to get the Cool Whip. They were  
18 trying to get the nitrous oxide. You ever go into the  
19 store and see canister for nitrous oxide and they saw  
20 boxes upon boxes upon boxes. As if someone was making  
21 whipped cream for the entire city of Philadelphia.

22 And they sell and they sell them and they  
23 sell them. So what does that have to do with this case?  
24 Pull up G One-thirty-six. There it is, they import it,  
25 imported by an American company, imported in bulk. What

1 is it? D.N.P. And it's funny when it's 2,4-  
2 Dinitrophenol, from a big giant company. For R&D use  
3 only, whatever that means, suddenly, the agent tells you  
4 that the F.D.A. doesn't regulate.

5 What? I almost stopped in my tracks -- I  
6 did stop in my tracks. I went back to the table. So I  
7 needed a chance to think does it even worth asking another  
8 question? Is it regulated or is it not regulated?

9 Why are we here? Good afternoon, ladies  
10 and gentlemen. And again, on behalf of the Court, we  
11 would like to thank you for taking the time out of your  
12 lives and your schedule to sit and listen to this case.  
13 And I agree if my recollection of the facts is any  
14 different than your recollection, it's your recollection  
15 that governs.

16 If I say anything -- if I say anything  
17 about the law will be very limited because this is one of  
18 the finest jurist in the country. Certainly the building.  
19 And I know he got the law right because he gave us the  
20 opportunity to review it. We all huddle up, we discuss it  
21 then the Court makes the decision what's right and His  
22 Honor -- His Honor (unintelligible).

23 He mentioned some very interesting things  
24 in the beginning when you all first see that and come into  
25 this building all the time and don't really pay much

1 notice to them. After the Court pointed out I did -- I  
2 blanked out and I looked. Most of those things about the  
3 Jury system because it's -- it's you, ladies and  
4 gentlemen, you're going to decide when you apply the facts  
5 to the law in this case.

6 You're going to decide whether or not this  
7 amounts to a violation of the charge for which he is  
8 charged within the indictment. And as his Honor told you  
9 that the indictment is not in evidence. What is the  
10 formal charge and the formal charge is misbranding that  
11 the defendant misbranded what this was.

12 Now, you also heard evidence from his  
13 former lawyer and the Court is going to advise that was  
14 not chargeable. This evidence was put forth to show  
15 consciousness of guilt. That's the government's theory of  
16 this evidence. But the Court is also going to instruct  
17 you that there could be other reasons for this conduct.

18 Now, ask yourself, ladies and gentlemen, at  
19 the time, you're an eighty-four-year-old retired doctor,  
20 you're eighty-four-year-old retired doctor who got charged  
21 with the full force of the United States government. His  
22 entire life spent helping people to the best of his  
23 ability, and you are charged by the federal government  
24 with a violation of the crime -- criminal activity.

25 And you go out and you hire a lawyer that

1       you have known for fifteen years, all right sir, help me  
2       with this case. And we get to three months before the  
3       trial of his life, three months and the lawyers says hey  
4       Doctor, you owe me a bunch of money, and I'm not prepared.  
5       Okay. I'm going to file a motion, he said judge this  
6       obligation -- that obligation. I'll say the way he said  
7       it, but we all know, I have other obligations, Your Honor,  
8       and this is a complex case and I need time to prepare.

9               For a normal person that means I'm not  
10       prepared. (unintelligible) says, listen, we're coming out  
11       of a pandemic. We're trying to get citizens who aren't  
12       concerned about their safety at the time that it's  
13       scheduled. We don't know how people are going to react to  
14       being around other people that they don't know.

15               We've been told for months, if not years,  
16       social distance, stay away, wear masks, wash your hands  
17       try to be careful who you're around, you don't know, now  
18       we're asking people from five different counties, six  
19       different counties to come to our courtroom and to try and  
20       keep an open mind while you're worrying about the  
21       pandemic.

22               Be there listen to a criminal case being  
23       around people that you don't know. I can't waste these  
24       resources and you guys are extremely valuable.

25       (unintelligible) just to let you know how important this

1 is why we need you. (unintelligible) July 26, August 3rd,  
2 lawyer wants money. My lawyer is not prepared when we saw  
3 it, but the most disturbing part to me is that he did  
4 notice the errors. Sends an email, there is no  
5 independent investigation, which is a duty to the Court.

6 Guy asked me for leave to go to work. You  
7 better -- better have my office call that work and verify  
8 that employment. This is a doctor's record that he had  
9 time and did nothing. He didn't even notice the  
10 discrepancy. Didn't even notice the discrepancy and that  
11 he never saw the eight dot, he never get this. So yeah,  
12 that -- it's not consciousness of anything.

13 That's consciousness of I want a fair shake  
14 at this trial. And I want a lawyer that's prepared and  
15 not worried about whether or not he's getting paid. I  
16 want to clear my name. So now, let's look at the real  
17 evidence in this case and the judge is certainly going to  
18 instruct you on the law.

19 And certainly the Judge who is in control  
20 of the law. The label is display printed upon the  
21 container the label is the written printed graphic  
22 materials that come with it. Defendant wasn't defrauding  
23 his customers. He was defrauding the F.D.A.

24 Can you put G Twenty-eight, please? We  
25 have a delay. Now, if the F.D.A. doesn't regulate 2,4-

1 Dinitrophenol, then we're done. And that was testified  
2 to, but let's look at one chart. Is it 2,4-Dinitrophenol?  
3 Yes. Is it a hundred and thirty-three milligrams diluted?  
4 Yeah. Was it expired December 1st, 2020? That's about  
5 right.

6 Isn't that for human consumption? That's  
7 correct. So when he's asked by the undercover special  
8 agent, what is the proper dosage? One capsule for one  
9 gallon of water, depending on the results. Did you check  
10 that -- is that about right? Didn't look. Why not? Is  
11 it fertilizer, weed killer? Okay. Did you try for it?  
12 Nope, didn't check.

13 I mean, it's got to have some legitimate  
14 purpose. We already know that certain companies get  
15 imported because we have it there. Right there, so it  
16 wasn't regulated. So what is misleading about that? Is  
17 there anything misleading about that?

18 The third bag that didn't have the label,  
19 the third on the cover file was already -- an existing  
20 companies already beginning to move. In fact, the doctor  
21 went steps further by attaching the medical documentation,  
22 the medical literature, the same medical literature he  
23 applied to when he got -- when his two point one kilos  
24 seized by customs. He wrote them a letter he attached the  
25 exact same medical package documentation to that letter as

1 he provided a link to or supplied with the 2,4-  
2 Dinitrophenol.

3 So what is misleading? And certainly what  
4 is mislabeled beyond a reasonable doubt the kind of doubt  
5 that would cause us to pause or hesitate before making an  
6 important life decision. This is the most twisted logic  
7 to try to get someone that I have ever seen. And the  
8 reason why I say that is because look, if you feel as if  
9 this is improper, then regulate it, put it on a drug  
10 scheduled, put it with marijuana, with cocaine, with  
11 fentanyl, with whatever other drug that you see fit.

12 And charge it the way it's supposed to be  
13 charged. That's the bottom line. This charge is not  
14 appropriate. The labelling is correct. The documents  
15 that he provided were correct. The answer to any  
16 questions were correct. The form that he had people fill  
17 out to say that they are not ingesting it was correct.  
18 There is nothing wrong with the labelling, there is  
19 nothing wrong with the substance. There is nothing wrong  
20 with the defendant's conduct.

21 And that's why you're here. Your verdict -  
22 - your verdict should be governed by the -- this verdict  
23 should be governed by the law as the Court gives you. And  
24 once you apply the facts, as you find them, to the law as  
25 the judge gives you there is only one verdict in this



1 case, one verdict and that is that Dr. Merlino is not  
2 guilty of any of these charges.

3 I thank you again for your time.

4 THE COURT: Members of the Jury the  
5 government now has a right of rebuttal and that's because  
6 it has the burden of proof. So in a civil case, the party  
7 bringing the case to plaintiff has a rebuttal because they  
8 have the burden of proof in a criminal matter. Because  
9 the government has the burden of proof it also gets a  
10 chance to make final remarks. And so with that Ms.  
11 Burnes, do you have any rebuttal to offer?

12 REBUTTAL

13 MS. BURNES: Members of the Jury keep your  
14 eye on the ball and keep your commonsense. You don't  
15 check it at the door when you walk in here. This is not a  
16 case about Wawa selling COVID. And it's a case about  
17 seller selling D.N.P. for human consumption. Is Wawa sold  
18 nitrous oxide in capsule form in its stores and advertise  
19 the nitrous oxide for weight loss, that's an F.D.A. case.

20 It's about the seller's intended use. It's  
21 the reason that the customers are buying it. The  
22 misbranding here, as we take a look at Government's Forty-  
23 four is about defrauding the F.D.A. Here, the seller  
24 calls it fertilizer.

25 When he knows because you've seen the

1 emails with David Freek, you've seen the emails from Jack  
2 Knapman, you've seen the emails with his other repeat  
3 customers. This is for diet, weight loss, human  
4 consumption. And when you evaluate his intent to consider  
5 how he knew what he was doing was wrong. You can take a  
6 look at how careful an (unintelligible)) he was in his  
7 communications with the special agent.

8 Use your commonsense, the first buy at the  
9 end of the eBay sales, never got the Material Safety Data  
10 Sheet. And that's what counsel just referred to as the  
11 medical documentation. Take a look at Government's  
12 Eighty-four. When you're talking to the government, you  
13 say 'oh wow D.N.P.' It's an industrial chemical. It's  
14 not for human consumption. It's dangerous. Nothing  
15 medical about that that. This is not a case about  
16 patients. This is not a case about medical practice.  
17 This is a business, these are customers and that material  
18 safety data sheet is what got sent to the Pittsburgh  
19 purchase which was made at Special Agent Arcari's  
20 direction by his colleague.

21 That's the third purchase in the chronology  
22 of envelopes that we looked at. And what's significant  
23 about that, is that on the email with a new customer, in  
24 December of 2018, Merlino attached the Medical Safety Data  
25 Sheet. Special Agent Arcari, who started his purchases in

1 August of 2018 never got that. In December of 2018, the  
2 special agent on the Pittsburgh buy, got the disclaimer,  
3 got the acknowledgement, got the sham form saying this is  
4 not for human consumption, I am twenty-one years of age,  
5 the encapsulation is for plants.

6 Use your commonsense, you've seen all the  
7 evidence, you get to put it in the order that it was  
8 developed. He never sent that disclaimer to a repeat  
9 customer, he sent it to someone new. Not for human  
10 consumption is the misbranding in this case because the  
11 entire point of the business was for human consumption.

12 Fertilizer (unintelligible) it's the  
13 misbranding in this case because the entire point of the  
14 business was human consumption. And the Material Safety  
15 Data Sheet that was sent to customs, the D.N.P. for  
16 agricultural use listed on eBay, all of those things are  
17 to lie and hide and disguise his conduct from getting  
18 caught -- from getting caught by the regulators. The Food  
19 and Drug Administration and Customs and Border Control.

20 And when you consider all of this evidence,  
21 there was only one (unintelligible) and that's guilty.  
22 Thank you.

23 THE COURT: All right, members of the Jury,  
24 we're reaching the point where I really need to earn my  
25 pay and instruct you on the law. But before we do that,

1 I'll give you a short ten-minute break to refresh  
2 yourselves. And when you come back, I will instruct you  
3 on the governing legal principles, all right. With that  
4 again let's all rise in recognition of the Jury's hard  
5 work.

6 (Off the record, 14:14:19 to 14:15:61)

7 THE COURT: We're back on the record just  
8 to place in perspective, again where we are for time  
9 management and logistical purposes. We deferred argument  
10 on Rule 29 motion to after closings with the Government's  
11 agreement that it would not assert any type of waiver.

12 And this would be the opportunity for the  
13 defense to make its arguments. And then if I -- I am  
14 persuaded and grant the motion then I would not proceed to  
15 charge the Jury. And so with that, Mr. Gamburg, you may  
16 proceed.

17 MR. GAMBURG: Yes, Your Honor. Judge,  
18 first off, again, I support, accurately said this is  
19 defense motion for judgment of acquittal pursuant to  
20 Federal Rule 29.

21 And Judge, I'd point out that the  
22 indictment specifically charges that from in or about  
23 November 2017, to in or about March 2019, defendant with  
24 the intent to defraud and mislead introduced them to  
25 interstate commerce delivered for introduction into

1 interstate commerce and caused the introduction delivery  
2 for introduction into interstate commerce, within the  
3 State of New Jersey to the Commonwealth of -- Pennsylvania  
4 2,4-Dinitrophenol a drug that was misbranded for having  
5 labels that was false and misleading.

6 Then in particular specifically by  
7 (unintelligible) was fertilizer and/or not for human  
8 consumption, (unintelligible) to be used and consumed as a  
9 human drug in violation of 21 U.S.C. 331(a), 352(a) and  
10 333(a) (2). The government then went basically saying that  
11 the F.D.A was the defrauded party.

12 And Judge if that was the case, then  
13 defendant should have been charged under Section 371 for  
14 offenses against the United States Government, he was not.  
15 So I don't see how that theory can possibly, to quote my  
16 cousin (unintelligible).

17 Secondly, Your Honor, with respect to  
18 misbranding. There is a case of a settlement I gave the  
19 Court to cite, as well as, Counsel for the government  
20 prior to beginning my argument, which deals with the  
21 identical language that was used in -- in our particular  
22 case (unintelligible) with the Court's indulgence. I won't  
23 belabor the issue.

24 THE COURT: Is it -- this is the Goldberg  
25 case.

1 MR. GAMBURG: Yes, sir.

2 THE COURT: Right. I -- I -- after I went  
3 back in chambers, I had actually pulled and read Goldberg,  
4 even in advance of trial.

5 MR. GAMBURG: Okay.

6 THE COURT: So I'm familiar with the facts  
7 and I was familiar with the holding, and then I had the  
8 opportunity to re-visit it over the lunch break.

9 MR. GAMBURG: Right. And there's not a  
10 doubt in my mind that the Court's familiar with those  
11 facts so based on that, Your Honor, I would argue that the  
12 Government has failed to meet its burden and the  
13 (unintelligible) regulatory.

14 THE COURT: All right, Mr. Gamburg, thank  
15 you.

16 MR. GAMBURG: Thank you.

17 THE COURT: Ms. Burnes?

18 MS. BURNES: Your Honor, under Rule 29, if  
19 I may remain seated?

20 THE COURT: Sure.

21 MS. BURNES: Under Rule 29, the Court must  
22 determine whether any rational trier of fact could find  
23 proof of the Defendant's guilt beyond a reasonable doubt  
24 based on the evidence presented at trial, viewing the  
25 evidence in the light most favorable to the government.

1                   And with respect to the full elements of  
2                   the crime charged that is introduction of misbranded drugs  
3                   into interstate commerce. The government clearly meets  
4                   that burden to survive Rule 29. That is if there's  
5                   sufficient evidence at the charged substance 2,4-  
6                   Dinitrophenol is a drug.

7                   There's significant evidence that the  
8                   intended use in this case was for the to -- to affect the  
9                   body and -- and to affect, to cure, mitigate, or treat  
10                  disease. That -- that evidence goes from the Defendant's  
11                  own statements to the encapsulation to his communications.

12                  Second that the drug was misbranded. The  
13                  evidence here is -- is that the not for human consumption  
14                  is misbranded because the product was in fact intended for  
15                  human consumption. And that labelling it as fertilizer on  
16                  -- on the website which is a labelling used because it's  
17                  controlled by the seller. That -- that's ample evidence  
18                  of that with respect to the screenshot, with respect to  
19                  the sales, with respect to the volume.

20                  Interstate commerce. Sufficient evidence  
21                  of -- of that in terms of the mailings and with the intent  
22                  to defraud or mislead and this goes directly to my -- my  
23                  counterpart's claim. It is the law under United States  
24                  (unintelligible) and then the -- the circuit cases that  
25                  follow that, including United States versus Alice

1 (phonetic spelling), which is the 4th Circuit United  
2 States versus Bradshaw, which is the 11th Circuit --  
3 Circuit that the intent to defraud or mislead as a person.

4 And that such persons can include the  
5 United States and its agencies with regulating the sale of  
6 drugs as well as other identifiable government agencies.  
7 And so the -- the case is properly charged under the  
8 theory, which has been articulated from the beginning of  
9 the case and is replicated throughout the case law among  
10 the subjects, which is to say, among the Circuits, which  
11 is to say that persons under the statute with the intent  
12 to defraud or mislead can include the F.D.A. and the  
13 C.B.P.

14 With respect specifically, under some sort  
15 of claim that this case should have been charged under 371  
16 that's -- that's the I -- I was not able to pull up the --  
17 the cases that specifically addressed that. But this is  
18 a, that's a conspiracy statute with respect to, you know,  
19 defraud the United States.

20 The question here for the -- for the Court  
21 under Rule 29 is whether or not there was sufficient proof  
22 for the case to get to the Jury under the elements of --  
23 of the crime charged and (unintelligible).

24 THE COURT: All right. Anything further  
25 from you, Mr. Gamburg?



1 MR. GAMBURG: No, Your Honor.

2 THE COURT: All right, with -- with respect  
3 to the -- the Government's choice of which statutory  
4 provision what to proceed under I think that's within the  
5 discretion of the Government. And -- and the only issue  
6 is really whether under the -- the charges in the  
7 indictment they have set forth a case that -- that is  
8 sufficient under the standard for Rule 29.

9 I think the Goldberg case is significantly  
10 distinguished for Mr. Gamburg because what I saw there is  
11 a lack of deception and a lack of -- of sleight of hand,  
12 so to speak, that I think is fairly in the record here  
13 when one looks at the Twitter feed and compares that to  
14 other things and given the email traffic as well. So it's  
15 on a factual basis that I distinguish Goldberg.

16 With respect to the -- the legal question.  
17 I don't think there's a controlling 3rd Circuit case, but  
18 I think the Government is correct that the unanimous  
19 weight of authority among the circuits is that an intent  
20 to defraud the F.D.A. and not an attempt to -- is  
21 sufficient and there is not a separate requirement that an  
22 individual consumer be in any way misled or defrauded.

23 And -- and so I -- I commend you, Mr.  
24 Gamburg, going on your analysis of the issues but I'm  
25 constrained to -- to rule against you and deny the motion.

1 MR. GAMBURG: Thank you, Your Honor.

2 THE COURT: All right. So what we'll do  
3 now is I'll take, you can take a few minutes but we'll try  
4 to reconvene as quickly as we can and charge the Jury.

5 MR. GAMBURG: Can I ask you question off  
6 the record.

7 THE MONITOR: Off the record.

8 (Off the record; 14:23:45 to 14:33:34)

9 JURY CHARGE

10 THE COURT: All right, Counsel you may be  
11 seated. The jury may have noticed this. This is the  
12 first time since you began your service, I did not rise in  
13 your honor and that's because for the next half hour or so  
14 I'm the most important person in the Courtroom. So if --  
15 if I may, let me go and instruct you on various points of  
16 law.

17 I'm going to begin with what's essentially  
18 a review which was only a couple of days ago. So this  
19 will be familiar. But I'll begin by talking about your  
20 role and my role. Obviously, as I said at the outset,  
21 your role and your role alone will (unintelligible) to  
22 decide the facts of the case.

23 And it's your role, and your role alone to  
24 decide on the verdict of the case. Don't take anything  
25 I've said, done any expression on my face to suggest I

1       have a view. I don't and it's not my role. My only role  
2       is to instruct you on the law at this point having already  
3       presided over the trial itself.

4               And it's your obligation to follow the law  
5       as I instruct you. And I'm going to be explaining to you  
6       the legal principles that will govern your decision. And  
7       -- and let me tell you at the outset, with respect to the  
8       critical legal principles. The definition of the offense  
9       and the elements of the offense and what must be comprised  
10      in any verdict.

11             I will send out with you that written  
12      portion of my instructions, okay. So you will have a  
13      guideline with which -- which you can follow. And you  
14      also have a verdict slip that will be very specific. All  
15      right.

16             So I know that jurors are sometimes afraid  
17      we're going to get it. And you know, we're going to  
18      understand everything that Judge is saying and between  
19      what I say now and what I've provided to you I'm sure that  
20      you will.

21             And as I said at the outset, it's your  
22      obligation to follow the law whether you agree with it or  
23      not, that's my obligation to follow the law whether I  
24      agree with it or not. Your verdict has to be unanimous  
25      which is to say all of you must agree on either a verdict

1 of guilty or agree on a verdict of not guilty, or there  
2 will be no verdict. All right.

3 So it must be the unanimous verdict, of all  
4 jurors. And as I said at the outset, we rely upon you in  
5 good faith, to have an exchange of views among yourselves  
6 as to the evidence you've heard. What it means and what  
7 your verdict should be. Up till now, I said, don't  
8 communicate with anyone.

9 And similarly, when you're deliberating  
10 there will be no communication with you. And Mr. Henry  
11 will take electronic devices. And if there's to be any  
12 communication that will come in writing from the  
13 foreperson, to me through Mr. Henry and then I will  
14 respond to any question that you have.

15 And up to this point, obviously, we said  
16 don't do any outside homework. The same follows and I  
17 don't think you'll have any way to do any outside work  
18 while you're there deliberating in the Jury room. But  
19 it's so important that the verdict be yours and yours  
20 alone. We rely on you to perform your duties fairly and  
21 impartially.

22 And as I said before, sympathy, prejudice,  
23 fear, none of that should matter. And you should not be  
24 influenced by any person's race, color, religion,  
25 nationality, ancestry, gender, sexual orientation,

1 profession, occupation, economic circumstances, position  
2 in the community, nothing matters but the facts as you  
3 find them and the law as I give it to you.

4 During their closing arguments, Counsel  
5 said, if their recollection of the evidence is different  
6 than yours, yours controls. And similarly, if I happen to  
7 mention the fact which I doubt I will, that would be your  
8 recollection of the evidence that matters, not mine,  
9 because I play no role in deciding the facts of the case  
10 and no role in deciding the -- the verdict.

11 You need not be concerned with any  
12 punishment provided by law for the charge with which the  
13 defendant is on trial. That is exclusively my  
14 responsibility when the time comes. That does not rest on  
15 your shoulders and should not be considered by you as to  
16 what a potential sentence might be if you were to find the  
17 defendant guilty.

18 You need only concern yourself with guilty  
19 or not guilty. And then if you were to find the defendant  
20 guilty, responsibility would pass back to me. At the  
21 outset of the case, we talked about what evidence is and  
22 what it isn't. I'll go through that quickly because it's  
23 fairly recent.

24 The evidence obviously is the testimony  
25 that you've heard. You've now seen many other forms of

1 evidence in terms of documents and screen captures and  
2 records. You've seen physical evidence. And there have  
3 been stipulations in this case where the parties agreed,  
4 we'd say the following is true.

5 I think the best -- best example that is,  
6 as to lab tests, we didn't have to call a technician to  
7 say this is what the substance was, as to the various  
8 emails and other documents. How do we know this is from  
9 Google? Well, because the parties have stipulated, all  
10 right, and so that they've agreed to.

11 What is not evidence, the charges  
12 themselves are not evidence. The statements and  
13 arguments, the lawyers are not evidence. We haven't had a  
14 lot of objections. We have very experienced good counsel  
15 here. But the few objections there were that's not part  
16 of the evidence. I didn't need to strike any testimony,  
17 so you don't need to concern yourself with that.

18 And obviously, only what you have heard  
19 within the four walls of the courtroom is something you  
20 should consider. We've said this before, and at the risk  
21 of repeating myself, we rely on your judgment and  
22 commonsense. You bring your life experience to this  
23 courtroom and you make decisions the same way you would in  
24 important matters in your own life. And you follow your  
25 reasoning and your commonsense in deliberations and

1 finding the facts and in reaching a verdict.

2 Rules of Evidence control what it is that  
3 you've heard and really we -- we haven't had a lot by way  
4 of evidentiary disputes; two or three things I made a  
5 ruling on and it's only what I allowed in evidence that --  
6 that you should consider. And at the risk of redundancy,  
7 again, the lawyer's arguments and statements are  
8 important. But you are who matters inside the courtroom.

9 At the outset of the case, I talked about  
10 direct evidence and circumstantial evidence. And direct  
11 evidence is somebody who says this is what I saw. This is  
12 what I heard. This is what the document says.  
13 Circumstantial evidence is based upon a variety of other  
14 facts. These are certain things that follow and that we  
15 think are true.

16 And as I said at the outset, in a  
17 courtroom, direct and circumstantial evidence have the  
18 same value. And so if you take certain facts and you put  
19 them together and reason and commonsense tells you well,  
20 based on these facts, other things are true, that's  
21 acceptable. And indeed, we rely on juries to do that.

22 Because as a general rule in a case, not  
23 everything is within the realm of what a witness saw and  
24 you have to put together all of the various pieces of  
25 information which you have received. I think I gave you

1 the umbrella example, at the outset of the case. I gave  
2 you a parenting example now.

3 I have four kids, and depending upon how  
4 old you are, you may know that Tupperware makes these  
5 popsicle things. You can put the grape juice in with  
6 things and freeze them and you got yourself a popsicle.  
7 So one Saturday morning they're watching their cartoons  
8 which used to be a thing on Saturday morning, again,  
9 depending on how old you are.

10 And I'm in the freezer, and I noticed  
11 there's a popsicle missing. I said, all right, who ate a  
12 popsicle before breakfast? Not me, not me, not me. I  
13 said stick out your tongues. A-ha. We had a purple  
14 tongue. I found that I deduced that, in fact, this was  
15 the culprit, that is circumstantial evidence. All right,  
16 just a humorous but I think instructive example of what it  
17 means.

18 Now sometimes, you'll look at that evidence  
19 and people will have different reactions. My wife said,  
20 wait a minute, I gave an infant Tylenol, it was great.  
21 And then there could be a discussion. Turns out that  
22 wasn't the case. They weren't, you know, they hadn't  
23 eaten that popsicle.

24 But you can sometimes have facts from which  
25 people draw different and sometimes even opposite



1 conclusions. All right. But it's up to you to consider  
2 reason and commonsense and what you think follows from all  
3 of the evidence that you have heard. And so you may take  
4 into account everything that I've allowed you to hear as  
5 evidence, the testimonies, the documents, the exhibits,  
6 and you may consider the direct evidence and the  
7 circumstantial evidence and give it equal weight.

8 The Government must prove the defendant  
9 guilty beyond a reasonable doubt. But the government is  
10 not required to present all possible evidence related to  
11 any case or to produce all possible witnesses who might  
12 have some knowledge of facts about the case. And as I've  
13 said, the defendant never has any burden to present any  
14 evidence.

15 So the question is simply, only the  
16 evidence that you have heard, are you persuaded the  
17 government has proven the case beyond a reasonable doubt.  
18 In this case, we've had summaries of evidence that have  
19 been before you.

20 And there's a rule that says where the  
21 underlying records and documents are made available to the  
22 other side and then summarized in the form of an exhibit  
23 and admitted into evidence that that's proper for the Jury  
24 to consider. And so we have done that here because of all  
25 of the various records whether they would be financial

1 records or transaction records or emails. And that is  
2 something that has been admitted into evidence and you may  
3 consider in the case.

4 I've already talked about the stipulations  
5 that the parties have entered into. Actually, you can  
6 even reject a stipulation. So if the parties were to  
7 stipulate something that you found totally not believable,  
8 you would not be bound by that. And I mentioned that but  
9 otherwise, you take into account the fact that the parties  
10 agree certain things are true. And you may consider that  
11 as having been established in the record of the case.

12 The Defendant has pleaded not guilty to the  
13 charges. And as I said before, he's presumed innocent,  
14 when we started this record. Rather, he started this  
15 trial with a clean slate and and no evidence against him  
16 and that presumption of innocence remains today, even as  
17 you're about to deliberate.

18 And the Government must overcome that  
19 presumption of innocence and prove its case beyond a  
20 reasonable doubt. And you, therefore, are obligated  
21 because of the presumption of innocence. If the  
22 Government has failed to meet that burden, and it hasn't  
23 proven the case beyond a reasonable doubt, then, that  
24 means the defendant should be found innocent.

25 The presumption of innocence, as I said,

1 means the defendant never has a burden to present evidence  
2 or to testify in the case and the burden of proof remains  
3 on the government throughout. As I said before, and this  
4 is fundamental to our system of criminal justice, that the  
5 government must prove guilt beyond a reasonable doubt.

6 And so when I get to the definition of the  
7 offenses I will be talking about the elements of the  
8 offenses. You've heard some of that in argument and the  
9 government must prove each element beyond a reasonable  
10 doubt. Defendant may never be convicted based simply on  
11 suspicion or conjecture or guesswork, but only based on  
12 evidence that establishes their guilt beyond a reasonable  
13 doubt.

14 Proof beyond a reasonable doubt does not  
15 mean prove beyond all possible doubt, or prove to a  
16 mathematical certainty. Possible doubts are doubts based  
17 on conjecture, speculation and guesses or hunches are not  
18 the same as reasonable doubt.

19 A reasonable doubt is a fair doubt based on  
20 reason, logic, commonsense or life experience. It is a  
21 doubt that an ordinary reasonable person has after  
22 carefully weighing all of the evidence and it's a doubt of  
23 the sort that would cause him or her to hesitate before  
24 taking action in a matter of importance in his or her own  
25 life.

1           A reasonable doubt may arise from the  
2           evidence. It may arise from a lack of evidence. It may  
3           arise from the nature of the evidence. If now, having  
4           heard all the evidence, you were convinced that the  
5           Government has proven every element of the offense charged  
6           beyond a reasonable doubt then you should return a verdict  
7           of guilty for the offense.

8           However, if you have a reasonable doubt  
9           about one or more of the elements of the offense charged  
10          then you must return a verdict of not guilty on the  
11          offense.

12          As I said before, I will be defining the  
13          elements for you and then sending them out to the Jury  
14          room with you as well.

15          There is only one defendant before you.  
16          And the only question before you is whether the Government  
17          here has proven William Merlino guilty of the charge in  
18          the indictment. You're not called upon to return a  
19          verdict of guilt or innocence as to anyone else.

20          And so it's simply irrelevant if you felt  
21          there was someone else, who should in some way be  
22          implicated. All that is before you is whether -- as to  
23          this defendant on these facts, the government has proven  
24          its case beyond a reasonable doubt.

25          During the trial, you heard about various

1 witnesses and you were shown the investigative techniques  
2 used by the Government. There is no legal standard as to  
3 what particular investigative techniques law enforcement  
4 must use. So here we've heard about undercover buys and  
5 search warrants and everything.

6 Those are the (unintelligible) that  
7 followed in this case but there's no requirement that it  
8 used any specific technique and investigating a potential  
9 crime. Again, the only question is based upon the  
10 investigation they did and the evidence they gathered,  
11 have they proven this defendant's guilt beyond a  
12 reasonable doubt.

13 Going to go back and review some of the  
14 tips about assessing witnesses. All right, and  
15 credibility of witnesses. Credibility is just a fancy  
16 word for, do I believe this person? Do I think that the  
17 testimony was accurate? You may believe everything a  
18 witness says, part of what a witness says or none of it.

19 And as I said at the beginning, look at the  
20 behavior and the manner of the witness. You look at the  
21 explanations they give. You look at the other evidence in  
22 the case and you see whether or not it supports what the  
23 witness has said or in some way contradicts it. Talk  
24 about did the witness have the opportunity to know what  
25 they're testifying about. Did they see it? Did they hear

1       it? Do they have the knowledge necessary to say what  
2       they're saying? You look at the quality of what they're  
3       saying and their understanding of what they're talking  
4       about.

5               Obviously, you consider how they present  
6       themselves, their appearance, their demeanor, their  
7       behavior and their manner while testifying. It's always  
8       relevant. Well, does this witness have an interest in the  
9       outcome of the case, it's really bias or prejudice that  
10      they have.

11             Does the witness have any relation to a  
12      party in the case? And then we get to the point of well,  
13      was there anything that was consistent or inconsistent  
14      with what the witness previously said or with the other  
15      evidence.

16             And as I said at the outset, if there are  
17      inconsistencies in a record and it will be up to you  
18      whether there are or not in this case, that doesn't mean  
19      that somebody is not being truthful. It can be  
20      differences in the way that people will remember things,  
21      differences in the way that people will assess  
22      information. And it's up to you to decide, are there  
23      inconsistencies? If there are, do they matter? And if  
24      they matter, what do I make of it? Again, you can take  
25      all of that into account.

1           You are not required to accept testimony  
2           simply because it was not contradicted. And you're not  
3           required to accept testimony, even if the witness was not  
4           in any way challenged on cross examination. It's up to  
5           you to decide what to believe from any witness that you  
6           heard. And really, the technique surrounding it is  
7           irrelevant.

8           It's just how do you assess this individual  
9           and their testimony and their evidence? And do you find  
10          it worthy of belief? And after you've made a judgment  
11          about whether, yeah, I think that witness is believable.  
12          It's up to you to decide what importance you give to their  
13          evidence. Is it significant? Does it carry a real  
14          weight? Or is it something that doesn't really have a lot  
15          of meaning in the overall picture of the case?

16          The weight of the evidence to prove any  
17          fact does not necessarily depend upon the number of  
18          witnesses who testify or the quantity of the evidence that  
19          was presented. But what is more important than number or  
20          quantities, was the witness believable and how much weight  
21          do you give to their testimony and the other evidence in  
22          the case.

23          As I said in jury selection in the criminal  
24          case, you hear from government agents and law enforcement.  
25          And so here you've heard testimony from government

1 employees and -- and government agents. The fact that a  
2 witness is employed in law enforcement does not mean that  
3 his or her testimony, necessarily deserves more or less  
4 consideration or greater or lesser weight than any other  
5 witness.

6 At the same time, it's quite legitimate for  
7 defense counsel to question the believability of a law  
8 enforcement -- enforcement witness on the ground. Well,  
9 do they have a stake in the outcome of the case. A  
10 personal professional interest in the outcome of the case.

11 Again, such witnesses do not get more  
12 credibility, less credibility. They are assessed like any  
13 other individual who takes an oath and testifies before a  
14 jury. And it's up to you to decide what you make of the  
15 testimony that you've heard.

16 In the points of charges that I've  
17 discussed with counsel, not all are going to apply so I'm  
18 going to skip over fifteen because we did not go in that  
19 direction. But within this case, Dr. Merlino did not  
20 testify, and his attorney elected not to present evidence.  
21 And so we come back to the fundamental premises of our  
22 justice system. And that is that a defendant has an  
23 absolute right under the Constitution, not to testify and  
24 also not to present any evidence.

25 And that again, and I'm repeating, but I



1 repeat, because it's important. The burden of proof  
2 always rests with the prosecution. And it never shifts to  
3 the defendant. And no defendant is ever required to prove  
4 that he's innocent.

5 So as I said, during jury selection, you  
6 may not attach any significance to the fact that the  
7 defendant did not testify. You can't hold it against him.  
8 You can't draw any negative inference against him because  
9 he chose it not to testify. And therefore, do not  
10 consider for any reason that as a fact in your  
11 deliberations, right?

12 And if it comes up, just remind one  
13 another. Now we can't -- we can't go there because  
14 everyone as a citizen has a right not to testify.

15 Counsel, Seventeen and Eighteen I don't  
16 think really apply either and so we're going to move now  
17 to instruction Nineteen.

18 You have heard testimony that after the  
19 crime alleged was committed that William Merlino created  
20 false and fraudulent records in the name of a legitimate  
21 medical doctor and a hospital representing that he had  
22 been diagnosed with and was being treated for pancreatic  
23 cancer.

24 You've also heard testimony that he  
25 presented these fraudulent records to his prior counsel,

1       who in turn submitted them to prosecution and -- and to  
2       the Court. If you believe that William Merlino engaged in  
3       such conduct then you may consider this conduct along with  
4       all the other evidence in deciding whether the Government  
5       has proven beyond a reasonable doubt that he committed the  
6       crime charged.

7               Engaging in such conduct may indicate that  
8       Merlino thought he was guilty of the crime charged and was  
9       trying to avoid punishment. On the other hand, sometimes  
10      an innocent person may engage in conduct that seems  
11      suspicious but for which there is an explanation.

12             Whether or not evidence as to falsifying  
13      medical records causes you to find that the defendant was  
14      conscious of his guilty of the crime charged, and whether  
15      that indicates he committed the crime charged is entirely  
16      up to you as the sole judges of the facts.

17             And similarly, you must conclude that he  
18      did falsify records. But you must bear in mind that  
19      William Merlino is not on trial for anything to do with  
20      whether he falsified medical records. And you may  
21      consider this evidence only if you find it relevant to his  
22      consciousness of guilt on the charges brought against him  
23      here.

24             You've also heard testimony that the  
25      defendant made certain statements outside the Courtroom to

1 government officials and authorities in which he claimed  
2 that his conduct was consistent with innocence and not  
3 with guilt. The government claims that these statements  
4 are false.

5 If you find that the defendant made a false  
6 statement and that can be in writing, as well as an  
7 interview of some kind, in order to direct the attention  
8 of law enforcement away from him or the government away  
9 from him, you may but are not required to include the  
10 defendant believed that he was guilty.

11 It is reasonable to infer that an innocent  
12 person does not usually find it necessary to invent or  
13 fabricate an explanation or a statement to establish his  
14 innocence, but that is for you to decide. You may not  
15 however, conclude on the basis of this alone that the  
16 defendant is in fact guilty of the charge, of the crime  
17 for which he is charged.

18 You must decide whether or not any evidence  
19 about such statements shows that he believed that he was  
20 guilty and the significance if any to be attached to that  
21 evidence. And in your evaluation, you should consider  
22 that there may be reasons fully consistent with innocence,  
23 that could cause a person to give a false statement that  
24 he did not commit a crime.

25 Fear of law enforcement, reluctance to

1           become involved or simple mistake may cause an innocent  
2           person to give such a statement or explanation.

3                       Counsel, I don't think twenty-one is  
4           relevant either. And nor do I think twenty-two.  
5           Similarly, twenty-three.

6                       All right, twenty-four. Again, this is a  
7           little bit of a repeat, but all these principles are  
8           important. And under your oath as jurors you're not to be  
9           swayed by sympathy, bias, prejudice, fear of public  
10          opinion or your own views as to the propriety or social  
11          desirability of this conduct. And you were to be guided  
12          solely by the evidence in the case.

13                      The conduct charged in the indictment is  
14          illegal under federal law. The only issue for you to  
15          decide is whether or not the defendant has violated the  
16          law and in order to determine the guilt or innocence of  
17          the defendant solely on the basis of the evidence and --  
18          and the law as I'm about to charge you or what the  
19          elements of the offense are.

20                      If you find that the law has not been  
21          violated, you should not hesitate for any reason to return  
22          a verdict of not guilty. If on the other hand, you find  
23          beyond a reasonable doubt that the law has been violated  
24          as charged, you should not hesitate to render a verdict of  
25          guilty.

1 I don't think really twenty-five is an  
2 issue either, Counsel, and it's confusing.  
3 (unintelligible) principle of evidence that I don't think  
4 we involve ourselves with here. And I'm not going to  
5 submit the indictment to the Jury. I'm just going to  
6 explain what the elements of the offense so I will pass  
7 over twenty-six.

8 Now, instruction twenty-seven it has -- it  
9 has to do, you'll see in the verdict form. There is  
10 language that asks you whether the crime was committed on  
11 or about a certain date. And there's a range of dates  
12 that will appear on the verdict form that match the  
13 indictment, the charges in the case about when the conduct  
14 that the Government alleges occurred.

15 The Government does not have to prove with  
16 certainty, the exact date of the alleged offense. It is  
17 sufficient if the government proves beyond a reasonable  
18 doubt that the offense was committed on a date reasonably  
19 near the dates alleged. And again, there's dates to be  
20 set forth in the verdict form for you.

21 Similarly, when I get to defining the  
22 elements of the offense. You're going to see that there  
23 are four elements all of which need to be established. So  
24 it's this, this and that. So all four have to be  
25 established. But within some of the elements there'll be

1 the word or.

2 So when the word and is used, it means they  
3 all have to be there. And or means it has to be one or  
4 the other. All right. And so you'll see that in the  
5 definition of the elements of the offense. You've --  
6 you've heard some testimony about acts committed and where  
7 they were committed.

8 And the government alleges in the  
9 indictment that some act in furtherance of the offense  
10 charged occurred here in the Eastern District of  
11 Pennsylvania. There is no requirement that all aspects of  
12 the offense have taken place here in the Eastern District  
13 of Pennsylvania.

14 But for you to return a guilty verdict, the  
15 government must persuade you that some act in furtherance  
16 of the crime charged took place here within the Eastern  
17 District. Now, unlike the elements of the offense and  
18 everything else in the case which is beyond a reasonable  
19 doubt.

20 As to whether some act occurred in the  
21 Eastern District of Pennsylvania. The Government's burden  
22 is by a preponderance of the evidence. So preponderance  
23 of the evidence just means you find it more likely than  
24 not that one of the acts relevant to the case occurred  
25 here in the Eastern District of Pennsylvania.

1           If so, then they've established venue here  
2           in the Eastern District. The rest of the elements,  
3           though, as I mentioned, have to be beyond a reasonable  
4           doubt. So those are sort of general instructions about  
5           process and rules of evidence and then some preliminary  
6           thoughts on -- on how to look at the verdict sheet.

7           And -- and I'm now going to move to the  
8           substance of the offense charged, all right. And as I  
9           said before, you will have in writing this aspect of my  
10          instructions for you to consult along with the verdict  
11          sheet.

12          So this is a prosecution that arises in  
13          part of the Federal Food, Drug and Cosmetic Act, which is  
14          part of the United States Criminal Code and has an  
15          underlying purpose of the protection of the public health  
16          and welfare. And the elements, there are four.

17          There's only one charge before you. And  
18          the defendant is charged with the introduction of  
19          misbranded drugs into interstate commerce. And here are  
20          the four elements, one, that the charged substance, 2,4-  
21          Dinitrophenol, DNP, is a drug. That's number one.

22          Number two, the drug was misbranded in at  
23          least one way.

24          Three, the defendant introduced or caused  
25          the introduction of the drug into interstate commerce.

1                   And four, the defendant acted with intent  
2                   to defraud or mislead. If all of these elements have been  
3                   proved beyond a reasonable doubt, then you must find the  
4                   defendant guilty of the crime charged. Otherwise, you  
5                   must find the defendant not guilty. All right.

6                   So as I mentioned before, you need to find  
7                   all four elements that if you look at element four, it  
8                   says whether the defendant acted with the intent to  
9                   defraud or mislead, so there would be one or the other and  
10                  use of the word or.

11                  Now, having given you a summary of the four  
12                  elements, I'm going to go through them one by one. And  
13                  again, you'll have them with you in the jury room as  
14                  follows. I'm now going to talk about how the statute  
15                  defines what is a drug.

16                  A drug is an article intended for use in  
17                  the diagnosis, cure, mitigation, treatment or prevention  
18                  of disease in man or animals and articles other than food,  
19                  intended to affect the structure or any function of the  
20                  body of man or an animal. It also includes articles  
21                  intended for use as a component of either those first two  
22                  definitions.

23                  Whether a product is considered to be a  
24                  drug will depend upon its intended use. Intended use is  
25                  determined by the objective intent of the person



1 responsible for labelling the drugs. The intent is  
2 determined by such person's expressions or may be shown by  
3 the circumstances surrounding the distribution of the  
4 article.

5 Such objective intent may for example, be  
6 shown by labelling, claims, advertising matter or written  
7 or oral statements by such persons or their  
8 representatives. A product's intended use is what a  
9 reasonable person would conclude the manufacturer or  
10 seller intended based on all the relevant information.

11 You can determine the intended use of a  
12 product by considering the label, accompanying labelling,  
13 promotional material, advertising, all representations  
14 made about the product, the circumstances surrounding the  
15 distribution of the article and information from any other  
16 source which discloses intended use.

17 The mere use of a product's name itself can  
18 be a claim to diagnose, mitigate, treat, cure or prevent  
19 disease. You are not bound by any particular claims or  
20 statements made by the supplier or seller that purports to  
21 disclaim an intended use. If there's other evidence  
22 concerning intended use, that conflicts with those claims  
23 or statements.

24 If you find that the defendant intended for  
25 the D.N.P. product to be used for the diagnosis, cure,

1 mitigation, treatment or prevention of disease in people  
2 or to affect the structure of any function or any function  
3 of the body, then you must find that the 2,4-Dinitrophenol  
4 is a product. Dinitrophenol product is a drug under the  
5 statute. All right. So that's the definition of -- of a  
6 drug.

7 The second element is whether it was  
8 misbranded. First, a drug is misbranded within the  
9 meaning of the statute if its labelling is false or  
10 misleading in any particular way. And the statute  
11 provides two distinct definitions, the terms label and  
12 labelling.

13 The term label means a display of written  
14 printed or graphic material upon the immediate container  
15 of any article. The term labelling means all labels and  
16 other written printed or graphic material that appears on  
17 any product or appears on any of its containers or  
18 wrappers or that accompanies the product.

19 Thus, the term labelling is broader than  
20 the term label. And labels are but one kind of labelling.  
21 And it is unnecessary for the matter to have been  
22 physically attached to the drug or to have been shipped at  
23 the same time as the drug or with a drug to constitute  
24 labelling.

25 Under the statute, as I just explained,

1       such matter can constitute labelling if it accompanies the  
2       product. And so if such material is provided as part of  
3       an integrated distribution program, pertaining to a drug  
4       and explains the uses of the drug. Then it accompanies  
5       the drug and constitutes labelling.

6               For example, information on a company's  
7       website can -- can -- can constitute labelling if such  
8       information is provided as part of an integrated  
9       distribution program with respect to the drug. You do not  
10      need to find that the labelling is false or misleading in  
11      its entirety. You need only find that any single  
12      representation in the labelling is false or misleading.  
13      Any single misrepresentation is false or misleading.  
14      Provided however, you must all agree as to which one. So  
15      the particular misrepresentation found false and mislead  
16      -- and misleading you must agree upon as the jurors.

17             First two elements now the third,  
18      interstate commerce. Interstate commerce means commerce  
19      between any state and any place outside of that state  
20      including a foreign country. To introduce a drug in  
21      interstate commerce, the Defendant need not personally  
22      transport the drug across the state line it is enough that  
23      the defendant caused an interstate shipment of the drug or  
24      one of its components.

25             And finally, the fourth element is intent

1 to defraud or mislead. So the government has charged that  
2 the defendant violated provisions of the F.D.C.A. with the  
3 intent to defraud or the intent to mislead. To act with  
4 intent to defraud means to act with the specific intent to  
5 deceive or cheat, ordinarily for the purpose of bringing  
6 about some financial gain to oneself.

7 It is not necessary, however, to prove that  
8 anyone was in fact defrauded as long as -- as it is  
9 established beyond a reasonable doubt that the Defendant  
10 acted with the intent to defraud. You're instructed that  
11 to act with intent to mislead means to act with the  
12 specific intent to create a false impression by  
13 misstating, omitting or concealing material facts.

14 And it is not necessary again, however, to  
15 prove that anyone was in fact misled as long as it is  
16 established beyond a reasonable doubt that the defendant  
17 acted with the intent to mislead. Ordinarily, there's no  
18 way that a defendant's state of mind can be proven  
19 directly because no one can read another person's mind and  
20 determine what that person is thinking.

21 A defendant's state of mind can, however,  
22 be proved indirectly from the surrounding circumstances.  
23 This includes obviously such things as what the defendant  
24 said, what the defendant did, how the defendant acted and  
25 any other facts or circumstances in evidence that you find

1 bear upon the defendant's intent.

2 A defendant acts with intent to defraud or  
3 intent to mislead under the statute if the defendant acts  
4 with the intent to defraud or mislead another person in  
5 order to sell a misbranded drug. In addition to  
6 individuals, a person can include the United States and  
7 its agencies charged with regulating the sale of drugs, as  
8 well as other identifiable governmental agencies.

9 To act with the intent to defraud or  
10 mislead the United States needs to act with the specific  
11 intent to interfere with or obstruct a lawful governmental  
12 function by deceit, craft or trickery or at least by means  
13 that are dishonest.

14 Intent to defraud or mislead the United  
15 States can be established by proof beyond a reasonable  
16 doubt that the defendant took affirmative steps in an  
17 effort to conceal their activities from government  
18 agencies charged with regulating those activities, such as  
19 the Food and Drug Administration or U.S. Customs and  
20 Border Protection.

21 Now, in a moment, I'm going to discuss with  
22 you the sort of mechanics of what you do when you go back  
23 to deliberate but first, Mr. Henry, will you hand the Jury  
24 the verdict sheet? We have one for each of them, and then  
25 there's two copies of the substantive part of the charge.

1           The verdict sheets we'll pass out the  
2           instructions just hold on the end of the bar of the Court  
3           there. I gave you the whole stack so you're going to have  
4           to give one back to me. Members of the Jury, it's -- it's  
5           one count on the form. And it -- it -- it summarizes that  
6           the charge it gives you the range of dates and then  
7           provides a space for you to enter your verdict.

8           And then, as I said, the -- the four  
9           elements and their definitions you'll have in writing when  
10          you come back because it's with respect to the verdict  
11          sheet, you have to find the Government has proven those  
12          four elements in order to have a verdict of guilty, all  
13          right.

14          So now let me talk about the logistics of  
15          what happens in the first stage you're going to need to do  
16          when you go back and say, who's going to be the  
17          foreperson, all right. Now, the foreperson is not the  
18          boss of the Jury. They're certainly the convener and the  
19          facilitator of the Jury just as a point of communication  
20          with the Court, and in terms of just putting together  
21          whatever it is that you need.

22          Second and -- and I'm sure you already know  
23          this, but your verdict has to be unanimous. And so to  
24          find the defendant guilty of an offense, every one of you  
25          must agree that the government has overcome the

1 presumption of innocence with evidence that proves each of  
2 the offenses beyond a reasonable doubt.

3 To find the defendant not guilty every one  
4 of you must agree that the defendant has failed to  
5 convince you beyond a reasonable doubt. And again, if  
6 there were to be a finding of guilt, you need not concern  
7 yourself about sentencing that is ex -- exclusively my  
8 responsibility. I've already said enough times in your  
9 evidence, your verdict must be based only on the evidence  
10 and -- and the law.

11 And now's the time when you will be free to  
12 talk about the case which I've asked you not to do up to  
13 this point. Exchange your views honestly, carefully,  
14 respectfully, listen to one another. Everyone keep an  
15 open mind. No one should abandon a view they hold just  
16 because other people don't agree. But just exchange your  
17 views and see.

18 Often, jurors start out with different  
19 perspectives and over the process of deliberation, then  
20 they find some consensus. No one should ever change their  
21 mind just because another juror disagrees. Every one of  
22 you is free to consider the evidence and -- and consider  
23 the verdict as you see fit.

24 And while it's important for us to try to  
25 reach a verdict, you should only do so if you could do so

1 honestly and in good conscience. And we will rely upon  
2 you to exchange your views and -- and discharge those  
3 duties fairly and impartially. No one will know anything  
4 about your discussions. No one listens in.

5 If you took notes, remember they're just a  
6 guide. A notetaker does not have greater insight into the  
7 evidence than a non-notetaker. And they're not  
8 transcripts, there's only one transcript. And we don't  
9 even have that printed yet. So they're merely there to  
10 help guide your recollection of -- of -- of the evidence.

11 And again, if there are disagreements as to  
12 what the evidence shows, talk them through and see if you  
13 can find consensus. While you're deliberating if you need  
14 anything, if you have a question, just -- Mr. Henry's  
15 office is right there as you know. Pass a note to him and  
16 he will bring it to me. All right?

17 Never in any communication say here's where  
18 we are, Judge, that's none of our business. Okay? So you  
19 should never reveal anything about the substance of your  
20 deliberations and where you are. Just tell me what you  
21 need to know or tell me what you need. And then I'll  
22 respond. Sometimes I bring in and we have a chat.  
23 Sometimes I just get the lawyer's consent, send out a  
24 written answer to a question.

25 If you have a question. Keep deliberating



1 in the meantime. Because if you do have, let's say a  
2 legal question. I need to talk to the lawyers. So I get  
3 them and we huddle and everything else. So don't let's  
4 say, let's wait till we get this answer. Keep going and  
5 see if you can make progress without the answer.

6 If you can't, you can't. But oftentimes,  
7 jurors can figure out some other things. And then we get  
8 back to you as soon as we can. But we'll - we'll be right  
9 here standing by and try to respond to anything very  
10 expeditiously.

11 All right, Counsel, is there anything you  
12 would like to discuss at sidebar?

13 MR. GAMBURG: No, Your Honor.

14 MS. BURNES: No, Your Honor.

15 THE COURT: All right, that's their chance  
16 to say Judge you got this wrong. So, so far, so good.  
17 Now, Mr. Henry is going to take you back to the Jury room  
18 and are the substantive instructions there with the Jury,  
19 you still have those?

20 MR. HENRY: They're right here.

21 THE COURT: Okay, so you'll want two copies  
22 of those. I'm going to ask juror number fourteen please  
23 to go into the Jury room now with Mr. Henry and retrieve  
24 his belongings for the time being. You're not discharged.  
25 You're still here but I'll -- I'll explain in -- in a

1 moment what your role is going forward, all right?

2 And for the rest of you, would you stand-  
3 by. We will shortly escort you to the Jury room. If  
4 you're wondering what the paintings are on the wall in the  
5 Jury room they are the county courthouses of the nine  
6 counties that make up the Eastern District of  
7 Pennsylvania. I got in framed when I took the bench. I  
8 figured it would bring everybody together.

9 All right, so I'll ask you to just let your  
10 companions out, sir. Okay, so you could step down and  
11 just the -- yes, it's standing nearby and Mr. Henry, can  
12 you escort out the Jury?

13 MR. HENRY: Yes. All rise.

14 THE COURT: We're still on the record.  
15 I'll address juror number fourteen. It's always a  
16 difficult job for a judge as the Jury is about to  
17 deliberate to reveal to some jurors that they are  
18 alternate jurors. And you are an alternate. As you can  
19 see, we needed one of our alternates so it's vitally  
20 important that you are here.

21 And actually, your service is not over  
22 because we've had circumstances where deliberations begin,  
23 a juror is lost, and we then need to bring you in from the  
24 bullpen. And so it's my practice, Counsel, to escort  
25 alternate jurors into the secure (unintelligible) where

1 I'm responsible for their wellbeing and comfort. While  
2 the Jury deliberates? Is there any objection to that?

3 MR. GAMBURG: No, Your Honor.

4 MS. BURNES: No -- no, Your Honor.

5 THE COURT: All right. And then obviously  
6 I don't discuss the case at all. We discuss baseball and  
7 if you need to make a phone call so since Mr. Henry is --  
8 is dealing with the Jury and a C.S.O. will be up to  
9 preside usually is the case. I'll invite Mr.  
10 (unintelligible) why don't you gather your belongings and  
11 come on back with me.

12 And with that, Counsel will obviously like  
13 you to stand by for the rest of the afternoon.

14 MR. GAMBURG: Thank you, Your Honor.

15 MS. BURNES: Thank you, Your Honor.

16 THE COURT: I'll open the door from inside.

17 (Off the record; 15:19:29 to 15:19:44)

18 THE COURT: Please raise your right-hand,  
19 Officer? You do swear or affirm that you will keep this  
20 jury in a quiet convenient place for the deliberations  
21 that you allow no one to speak to them or speak to them or  
22 yourself touching on the issue before them unless it is to  
23 inquire if they have agreed upon a verdict so help you God  
24 or are you affirm?

25 MARSHALL OATH: I affirm.

1 (Swears in C.S.O.)

2 (Off the record; 15:20:18 to 15:53:44)

3 THE COURT: Counsel with -- with questions  
4 from the Jury especially questions of this kind which are  
5 more procedural in nature, my custom is to have -- reply  
6 in writing. And so I propose the following answer. And  
7 it bears the caption of the case and communication number  
8 one.

9 And it says when you have unanimously  
10 reached a verdict only a single verdict sheet recording  
11 the verdict signed by the foreperson is necessary. I've  
12 included the language when you have unanimously reached a  
13 verdict, just to underscore the fact that it would have to  
14 be the verdict of the entire jury as a safeguard for the  
15 defendant. Is that acceptable to the Government?

16 MS. BURNES: Yes, yes, Your Honor.

17 THE COURT: Is that acceptable to the  
18 defense?

19 MR. GAMBURG: Yes, Your Honor.

20 THE COURT: With that then, I will dispatch  
21 Mr. Henry with communication number one.

22 (Off the record; 15:54:36 to 16:08:40)

23 THE MONITOR: All rise.

24 THE COURT: All right, members of the Jury  
25 please be seated. I'm told that you have reached a

1 verdict, is that correct?

2 JUROR: Yeah.

3 THE COURT: All right, Mr. Henry, will you?

4 All right, Mr. Henry, will you please take the verdict?

5 MR. HENRY: Yes. First, I want to ask all  
6 members of the Jury to please rise. Members of the Jury,  
7 have you all agreed upon your verdict?

8 MEMBERS OF JURY: Yes.

9 MR. HENRY: Thank you. With all the jurors  
10 panel please take your seat but the foreperson.

11 Indictment number nineteen dash seven one seven between  
12 the United States of America and William A. Merlino as to  
13 count one, introduction of misbranded drugs into  
14 interstate commerce in or about November of 2017.

15 Two, in or about March 2019, you  
16 unanimously find William A. Merlino guilty or not guilty.

17 JUROR: Guilty.

18 MR. HENRY: Thank you. Please be seated.

19 THE COURT: All right. Is there any  
20 request to poll the Jury, Mr. Gamburg?

21 MR. GAMBURG: Yes, Your Honor.

22 THE COURT: All right, ladies and  
23 gentlemen, jury we're -- we're now just going to briefly  
24 ask each member of the Jury to affirm that that's your  
25 verdict. So we'll begin with the foreperson juror number

1           one, is that your verdict?

2                       JUROR NUMBER ONE:   Yes.

3                       THE COURT:   Juror number two?

4                       JUROR NUMBER TWO:   Yes.

5                       THE COURT:   Juror number three?

6                       JUROR NUMBER THREE:   Yes.

7                       THE COURT:   Juror number four?

8                       JUROR NUMBER FOUR:   Yes.

9                       THE COURT:   Juror number five?

10                      JUROR NUMBER FIVE:   Yes.

11                      THE COURT:   Juror number six?

12                      JUROR NUMBER SIX:   Yes.

13                      THE COURT:   Juror number seven?

14                      JUROR NUMBER SEVEN:   Yes.

15                      THE COURT:   Juror number eight?

16                      JUROR NUMBER EIGHT:   Yes.

17                      THE COURT:   Juror number nine?

18                      JUROR NUMBER NINE:   Yes.

19                      THE COURT:   Juror number ten?

20                      JUROR NUMBER TEN:   ...

21                      THE COURT:   Number, Juror number eleven?

22                      JUROR NUMBER ELEVEN:   Yes.

23                      THE COURT:   Juror number twelve?

24                      JUROR NUMBER TWELVE:   Yes.

25                      THE COURT:   Juror number thirteen?

1 JUROR NUMBER THIRTEEN: Yes.

2 THE COURT: And the record will reflect  
3 that that Juror thirteen is sitting as an alternate in  
4 place of our missing juror who succumbed to illness. So  
5 is that acceptable, Mr. Gamburg?

6 MR. GAMBURG: Yes, Your Honor.

7 THE COURT: All right. Thank you. And Mr.  
8 Henry will have the verdict recorded into the record.  
9 Ladies and gentlemen of the jury, thank you again for your  
10 service. I will be joining you shortly in the Jury room.  
11 I have to thank you personally for your service. I've --  
12 I've invited your colleague who did not deliberate to  
13 rejoin you.

14 And so with that, by all means find your  
15 way back and as I said I will be there shortly and once  
16 again, let's all rise in recognition and respect for the  
17 hard work of our fellow citizens. You can go ahead back.  
18 All right, Counsel, is there anything else that requires  
19 the attention of the Court.

20 MS. BURNES: Nothing from the Government,  
21 Your Honor.

22 MR. GAMBURG: No, Your Honor.

23 THE COURT: All right, with that the  
24 defendant will continue in custody and I will go and join  
25 the jurors.

(Off the record at 16:13:12)

CERTIFICATION

I, Judith Spriggs, court approved transcriber, certify that the foregoing is a correct transcription from the official electronic sound recording of the proceeding in the above-entitled matter.



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Judith Spriggs

Associated Reporters Int'l., Inc. 10th September, 2022